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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 1034.

THE UNION PACIFIC RAILWAY COMPANY, APPELLANT,

vs.

THE UNITED STATES,

AND

No. 1035,

THE UNITED STATES, APPELLANT,

vs.

THE UNION PACIFIC RAILWAY COMPANY.

APPEALS FROM THE COURT OF CLAIMS.

FILED OCTOBER 8, 1885.

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1 THE UNION PACIFIC RAILWAY COMPANY
v.
THE UNITED STATES.
} No. 14389.

This case was commenced by three distinct petitions, as follows:

The Union Pacific Railroad Company v. The United States, No 11901. Petition filed January 8, 1878.

The Union Pacific Railroad Company v. The United States, No. 12518. Petition filed April 14, 1881.

The Union Pacific Railway Company v. The United States, No. 14389. Petition filed June 6, 1884.

Order of consolidation.

December 8th, 1884, the Court of Claims made the following order:

It is ordered by the court, the parties thereto consenting, that the above-entitled causes be, and the same are hereby, consolidated, and that they be hereafter proceeded with as one cause under number 14389.

2 Amended petition filed as a substitute for all previous petitions:

To the honorable the judges of the Court of Claims:

The said three causes above entitled having heretofore, by consent of parties, been consolidated by order of said court to be proceeded with under the title of The Union Pacific Railway Company against The United States, the said Union Pacific Railway Company, under leave and direction of the court, by way of amended petition, respectfully represents:

I.

That the Union Pacific Railroad Company was a corporation duly organized under the act of Congress approved July 1st, 1862, entitled "An act to aid in the construction of a railroad and telegraph line from 3 the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes," and the act amendatory thereof, approved July 2d, 1864; and, as such, owned and operated a line of railroad and telegraph extending from Council Bluffs, in Iowa, to Ogden, in the Territory of Utah.

II.

That "The Kansas Pacific Railway Company" was a corporation duly incorporated by an act of the legislature of the Territory of Kansas, under the name of "Leavenworth, Pawnee and Western Railroad Company," the name thereof being afterwards changed to "The Union Pacific Railway Company, Eastern Division," and then to "The Kansas Pacific Railway Company;" that the said company is the same company named in the said acts of Congress of July 1st, 1862, and July 2d, 1864, as "The Leavenworth, Pawnee and Western Railroad Company," as entitled to the benefits of the said acts of 1862 and 1864; that the said Kansas Pacific Railway Company owned and operated a railroad from Kansas City, Missouri, to Denver, in Colorado, during the periods hereinafter named.

III.

That "The Denver Pacific Railway and Telegraph Company" was a corporation organized for the purpose of constructing a railroad and telegraph line from the city of Denver, in Colorado, to Cheyenne, in the Territory of Wyoming; that under and by virtue of an act of Congress approved March 3d, 1869, and an act of Congress approved June 30th, 1874, it was provided that "The Denver Pacific Railway and Telegraph Company should be deemed and taken to be a part and extension of the road of the "Kansas Pacific Railway" to the point of junction thereof
3½ with the road of the Union Pacific Railroad Company at Cheyenne, as provided in the act of March 3d, 1869; whereby, and by force thereof, the said "Denver Pacific Railway and Telegraph Company" became entitled to participate in the benefits of the said acts of July 1st, 1862 and July 2d, 1864, and the various acts amendatory thereof and supplemental thereto, relating to the "Pacific system" of railroads, all of which will more fully appear by reference to the said acts of Congress; that during the periods hereinafter mentioned the said "Denver Pacific Railway and Telgraph Company" owned and operated a railroad and telegraph line from said city of Denver to said city of Cheyenne.

IV.

That on the 24th day of January, A. D. 1880, under and by virtue of the 16th section of the said acts of 1862 and 1864, the said companies hereinbefore named entered into articles of union and consolidation under the corporate name of "The Union Pacific Railway Company," a copy of which articles was duly filed in the Department of the Interior on the 26th day of January, A. D. 1880, and thereby and thereupon your petitioner became a corporation under the said name of "The Union Pacific Railway Company."

V.

That under and by virtue of said consolidation and incorporation as aforesaid the claimant succeeded to, possessed, and became entitled to receive from the Government of the United States all and singular "the grants, benefits, immunities, guarantees, acts, and things to be done and performed, and subject to the same terms, conditions, restrictions, and requirements which the said companies, respectively, at the time of such consolidation were or might thereafter be entitled to or subject to"
4 under the said acts of July 1st, 1862, and July 2d, 1864, in place and substitution of said companies so consolidated, repectively.

VI.

That under and by virtue of section 6 of said act of 1862, and the acts amendatory thereof, it was stipulated and agreed, between the United States and the said several railroad companies therein mentioned, that, whenever required to do so by any Department of the Government of the United States, the said Government should at all times have preference in the use of the said railroad and telegraph lines respectively, for the purpose of transmitting dispatches over the said telegraph lines, and transportation of mails, troops, munitions of war, supplies, and public stores over said railroads, for the said Government; that the said Government should pay to the said companies, for such service, "fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service;" and, by section 6, as amended by the act of 1864, it was further stipulated that one-half of the compensation for services rendered for the Government should be applied to the payment of certain bonds issued by the Government of the United States in aid of the construction of said roads, and interest thereon, until the amount thereof was fully paid; and that the other half should be paid to the said companies in cash.

VII.

That under and pursuant to the said contract and agreement the said Union Pacific Railroad Company, prior and up to the 30th day of June, 1878, transmitted dispatches and transported troops, mails, munitions of war, supplies, public stores, passengers, mail agents and clerks, over the
said line extending from Council Bluffs to Ogden, at the request of
5 the several Departments of the Government of the United States,
in the schedules hereunto attached and hereinafter more particularly referred to; that the said service so rendered and performed by the company for the United States amounted in the aggregate to the sum of $3,768,568.60, a detailed statement of which, containing the dates of the rendition of said service, the Department by which it was requested, and the amounts of the several items thereof, is fully and particularly set forth in the schedules hereto annexed and made a part hereof, marked No. 1, and A and C; and claimant avers that the several amounts charged in said exhibits for the services so performed were the rates therefor which it had determined and fixed, both as respects the Government and public, and of which the Government and the several Departments were duly notified, which rates claimant avers were fair and reasonable and not exceeding the amounts paid by private parties for the same kind of service, and amounted in the aggregate to the said sum of $3,768,568.60; that the said services were continuous during all the said period embraced in the said schedules. Claimant avers that for one-half of the said sum it is entitled to payment in cash and judgment accordingly, and that for the other half of the said amount it is entitled to have the same applied as required by section five (5) of the act of July 2d, 1864, to wit, to the payment of the bonds issued by the Government in aid of the construction of the said road.

VIII.

That during the period covered by the schedules hereinafter named the said "Kansas Pacific Railway Company" transmitted dispatches and transported mails, troops, munitions of war, supplies, public stores, passengers, mail agents and clerks, on and over the said road from Kansas City to
Denver, prior to the date of the said consolidation; and after the
6 date of said consolidation the Union Pacific Railway Company,
claimant, transmitted dispatches and transported troops, munitions of war, supplies, public stores, mails, passengers, mail agents and clerks,

over the said road, the said service being rendered at the dates and to the amounts, on the request of the several Departments, mentioned in Schedule E, heretofore filed, and in Schedule F, hereto attached and made a part hereof; that the charges set forth in said Exhibit E are "fair and reasonable, and not in excess of what was at the said time paid by private parties for the same kind of service," and the amounts set forth in Schedule F are the amounts that have been allowed by the defendant for the service therein referred to; that the said Kansas Pacific Railway Company, to the extent of $393\frac{15}{16}$ miles, extending from Kansas City westwardly on the line of said road, was aided, in its construction, by bonds of the United States, pursuant to the said acts of 1862 and 1864; and the United States, under and by virtue of the legislation hereinbefore referred to, was entitled to retain of the said compensation for the transmission and transportation hereinbefore referred to and stated the one-half thereof to be applied to the liquidation of the said bonds and interest thereon, and the other half was and is due and payable to claimant in cash. That as to the remaining portion of said road, to wit, a distance of $245\frac{1}{16}$ miles, the same was not aided by bonds of the United States, and claimant is entitled to have the full amount of such compensation for services rendered over such portion of said road paid to it in cash; that the Kansas Pacific Company was the owner of a branch road, commonly known as "The Leavenworth Branch," which also was not aided by any bonds of the United States, and which branch road enters and forms a part of the said consolidation; that a portion of the said earnings named in the said exhibits was for services for transportation performed for the United States on and over the said "Leavenworth Branch;" that the amount due to claimant in cash
7 on account of the said service over the said $393\frac{15}{16}$ miles, and the whole amount due for such services rendered on the said $245\frac{1}{16}$ miles and on the "Leavenworth Branch," is the sum of $1,415,415.25, which is due and owing from the Government of the United States to the claimant; the other half of the amount in said schedules for Government transportation on said subsidized part of the said road claimant is entitled to have ascertained and applied on bond and interest account, under said section 5 of the act of July 2d, 1864.

IX.

That during the period referred to and specified in Schedules G and H, heretofore filed and now made a part hereof, the said "Denver Pacific Railway and Telegraph Company," prior to the said consolidation and after the said consolidation was effected, said Union Pacific Railway Company, claimant, transmitted, dispatched, and transported troops, mails, clerks, munitions of war, supplies, and public stores on and over the said road from Denver to Cheyenne, at the dates, for the amounts, and on the requests of the several Departments named and specified in the said schedules, marked G and H; that the amounts charged as compensation for the services so rendered for the United States, as set forth in said schedules, are "fair and reasonable, and not in excess of what was and is paid by private parties for the same kind of service;" that the said "Denver Pacific Railway and Telegraph Company" received no bonds of the United States in aid of the construction of the said road, and by reason thereof there is due and owing from the United States to claimant the full amount of said transportation, to wit, the sum of $94,206.20, which claimant is entitled to have and receive from the United States in cash.

X.

8 Your petitioner states that it is the owner of the claims set forth in the foregoing petition, and the only party in interest; that no assignment or transfer of the said claim, or any part thereof, or interest therein, has been made, and that the claimant is entitled to the amount therein claimed from the United States; that the defendant is entitled to no set-off against the same, except such claim as defendant may have for five per cent. of net earnings on said subsidized parts of said road, under the acts of July 1st, 1862, and July 2d, 1864.

And this petition is filed in amendment and revision of the claims of petitioner herein set forth, in respect of services on the Union Pacific Railroad, down to June 30th, 1878, and of all services on the Kansas Pacific and Denver Pacific roads down to December 31st, 1882, as in the foregoing petition and schedules, and the said three cases, as above entitled and consolidated, as hereinbefore stated.

XI.

Your petitioner therefore prays judgment, in cash, on account of the several matters hereinbefore set forth, in the aggregate amounting to the sum of $3,393,905.75, and for such other relief in the premises as may be equitable and just.

[SEAL.] THE UNION PACIFIC RAILWAY COMPANY,
By CHARES F. ADAMS, JR., *President.*

Attest:
JAS. M. HAM,
Ass't. Sec'y.

JOHN F. DILLON,
SHELLABARGER & WILSON,
Atty's for the Claimant.

9 In the Court of Claims.

THE UNION PACIFIC RAIWAY COMPANY, CLAIMANT,
vs.
THE UNITED STATES, DEFENDANT.

SOUTHERN DISTRICT OF NEW YORK,
City and County of New York, ss:

Charles Francis Adams, jr., of the city of Boston, State of Massachusetts, being duly sworn, deposeth and saith that he is the president of the Union Pacific Railway Company, the claimant and petitioner in the above-entitled cause; that he has read the above and foregoing petition and knows the contents thereof, and that he believes the facts stated in said petition are true; that the said claimant is the owner of the said claim set forth in said petition, and the only party in interest therein, and that no assignment or transfer of said claim, or any part thereof or interest therein, has been made, and that the claimant is entitled to the amount therein claimed from the United States, and defendant is entitled to no set-off against the same, except such claim as defendant may have herein for five per cent. of net earnings under the said acts of Congress of July 1st, 1862, and July 2d, 1864.

CHARLES F. ADAMS, Jr.

Sworn and subscribed to before me this 20th day of December, A. D., 1884.

[SEAL.]

W. W. COTTON,

Notary Public, Kings County.

Certificate filed in New York County.

10

Exhibit F.

The United States Post-Office Department to the Union Pacific Railway Co., Dr., for transportation of United States mails over the Kansas Pacific Railway, and the Leavenworth Branch, from January 1, 1873, to December 31, 1882, both inclusive, viz:

Service.	Kansas Pacific.		Leavenw'th Branch.	Total.
	Mail.	Postal cars.		
Jan. 1 to June 30, '73	$47,925 00		$1,402 50	$49,327 50
July 1, '73, to June 30, '74	121,410 00		2,970 00	124,380 00
July 1, '74, to June 30, '75	121,410 00		2,970 00	124,380 00
July 1, '75, to Dec. 31, '75	60,705 00		1,485 00	62,190 00
Jan. 1, '76, to June 30, '76	60,705 00		1,485 00	62,190 00
July 1, '76, to June 30, '77	109,269 00		2,673 00	111,942 00
July 1, '77, to June 30, '78	93,309 97		2,673 00	95,982 97
July 1, '78, to June 30, '79	84,832 44		2,247 76	87,080 20
July 1, '79, to June 30, '80	101,795 08		2,247 76	104,042 84
July 1, '80, to June 30, '81	108,913 00		2,247 76	
(Sept. 15, '80, to June 30, '81)		$9,341 21		120,501 97
July 1, '81, to June 30, '82	108,913 00	11,772 48	2,247 76	122,933 24
July 1, '82, to Dec. 31, '82	57,515 25	5,901 24	1,273 72	64,690 21
	$1,076,702 74	$27,014 93	$25,923 26	$1,129,640 93
P. O. cars, Kansas Pac	$27,014 93			
Mail, " "	$1,076,702 74			
	$1,103,717 67		$25,923 26	$1,129,640 93

11

Pleas to amended petition.

The Attorney-General comes on behalf of the United States, and for answer to the amended petition filed in the above cases as consolidated, denies each and every allegation therein contained and prays that the petition be dismissed.

And for a further plea in this behalf the Attorney-General says that the said plaintiff ought not to have or maintain its aforesaid action against the defendants because he says that the said Union Pacific Railway Company before and at the time of filing said amended petition was, and 12 from thence hitherto hath been, and still is, indebted to the said defendants in a large sum of money, to wit, in the sum of $11,500,000, lawful money of the United States, which the defendants set up as a counter-claim herein, and set forth the grounds for such defense as folows:

The Union Pacific Railroad Company, duly incorporated under and pursuant to the act of July 1, 1862, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes," by acceptance of the benefits of said act became liable to and covenanted to observe the conditions, limitations, and obligations of said act and of acts amendatory thereof.

The Leavenworth, Pawnee and Western Railroad Company of Kansas, mentioned in the ninth section of the act of Congress of July 1, 1862, accepted the provisions of the act, and was thereafter designated as the Union Pacific Railway Company, eastern division. Under authority of the act of Congress of March 3, 1869, its board of directors, by resolution, changed its name to the Kansas Pacific Railway Company, a copy of which resolution was duly filed in the office of the Secretary of the Interior.

The said Union Pacific Railway Company, Eastern Division, since called the Kansas Pacific Railway Company, received from the United States, under said act of July 1, 1862, and acts amendatory thereof and supplemental thereto, their bonds of $1,000 each to the amount of sixteen of said bonds per mile. The total amount of bonds received by said company amounted to $6,303,000. The number of miles the construction of
which was thus aided was three hundred and ninety-three and nine
13 thousand four hundred and twenty-five ten thousandths, and the
same were completed on the 2d November, 1868.

On the 24th January, 1880, the said Kansas Pacific Railway Company and the Denver Pacific Railway and Telegraph Company, mentioned in the act of Congress of June 20, 1874, and the said Union Pacific Railroad Company formed themselves into one consolidated company, called the Union Pacific Railway Company, in accordance with the act of Congress of July 1, 1862, and of acts amendatory thereof and supplementary thereto, and filed notice of such consolidation in the Department of the Interior.

By reason of the consolidation the claimant became subject to the same terms, conditions, restrictions, and requirements which said companies respectively at the time of such consolidation were or might be entitled or subject to in place and substitution of said companies so consolidated, respectively, and hence the Union Pacific Railway Company became bound and covenanted to pay to the United States all debts or obligations imposed upon the Kansas Pacific Railway Company and the Union Pacific Railroad Company by the act of July 1, 1862, and the several statutes amendatory thereof.

In and by said statutes it was obligatory upon the Kansas Pacific Railway Company to pay to the United States 5 per centum per annum upon the net earnings of the said $393\frac{9425}{10000}$ miles, which 5 per centum from November 2, 1868, to December 31, 1882, amounted to $1,000,000.

And it was obligatory upon the Union Pacific Railroad Company to pay to the United States 5 per centum per annum of the net earnings of said road up to June 30, 1878, which 5 per centum from November 6,
1875, to June 30, 1878, amounted to $1,500,000.

14 And it was obligatory upon the Union Pacific Railroad Company
to pay to the United States, from and after June 30, 1878, 25 per centum of the gross earnings of the said road after deducting the necessary expenses actually paid within the year in operating and keeping the

same in a state of repair, and also the sum paid within the year in discharge of interest on the first-mortgage bonds, which 25 per centum, from June 30, 1878, to December 31, 1882, amounted to $9,000,000.

Wherefore the United States claim judgment against the claimant in the sum of $11,500,000.

And for a further plea in this behalf the Attorney-General says of the amounts set forth in the said amended petition as due for transportation of mails over the Kansas Pacific Railway, claimant has already, to wit, on the 18th April, 1881, recovered a judgment in this court for $34,623.08 for one-half of mail transportation over the aided 394 miles, and the whole of the mail transportation over the non-aided portion of said road during the first and second quarters of the year 1880, said judgment being in suit No. 12380.

And for a further plea in this behalf the Attorney-General says that for one-half of all transportation rendered to the United States by the Union Pacific Railroad Company that had been allowed by the accounting officers prior to the 28th January, 1876, said company recovered judgment in this court in suits No. 9830 and No. 10899.

THOMAS SIMONS,
Assistant Attorney-General.

15 *Replication to counter-claim.*

And now comes the said claimant, and by leave of the court first obtained, by way of reply to the counter-claim filed by the defendants in said case, says:

That it admits the consolidation of the Union Pacific Railroad Company, the Kansas Pacific Railway Company, and the Denver Pacific Railway and Telegraph Company, as in said counter-claim set forth.

It denies that it is indebted to the defendants in the sum of $11,500,000, as in said counter-claim averred, or in any other sum.

It denies that it is indebted to the defendants on account of the five per centum of net earnings of the said Kansas Pacific Railway Company on the said 393.9425 miles in the sum of $1,000,000, as averred in said counter-claim, or in any other sum.

16 It denies that it is indebted to the defendants on account of five per centum of net earnings of the Union Pacific Railroad Company in the sum of $1,500,000, as averred in said counter-claim, or any other sum.

It denies that it is indebted to the United States, or is under any obligation to pay to the United States, the sum of $9,000,000, or any other sum, on account of 25 per centum of the gross (net) earnings of said road, after deducting the necessary expenses actually paid within the year in operating and keeping the same in a state of repair, and also the sum paid within the year in discharge of interest on the first-mortgage bonds, as averred in said counter-claim.

And the claimant avers as to the said 25 per centum last above referred to, the amount required to be paid by the claimant is required to be paid into a sinking fund for the benefit of said company, and to be used in liquidation of its obligations; and the amount so to be paid is such a sum, not exceeding the sum of $850,000 in any one year, as, added to the amount earned by said companies for transportation for the defendants, will amount to 25 per centum of the net earnings of said company; and no money is required to be paid into the said sinking fund unless the compensation for transportation shall not equal 25 per centum of said net earnings.

And claimant further avers that during the said period mentioned in said counter-claim, to wit, from the 30th of June, 1878, to the 31st of December, 1882, the United States became, was, and is indebted to the said Union Pacific Railroad Company and its successors, under and by virtue of the said consolidation, the Union Pacific Railway Company, in the sum of $7,158,166.06, as more fully appears by the schedules heretofore filed, annexed, and now made a part hereof, marked B and D, for services rendered in transporting mails, troops, munitions of war, supplies, public stores, passengers, agents, and clerks over the said Union Pacific Railroad, or said Union Division, as is set forth in said exhibits, and that
17 the charges for the services so rendered over the said line of railway are at rates fixed and determined by the claimant for such services to the public and the defendants, and are fair and reasonable, and not in excess of what is paid by private parties for the same kind of service. One-half of said amount, namely, $3,579,083.03, is applicable to bond and interest account, and the other half to the sinking-fund account, under the act of May 7th, 1878, which said last-mentioned sum is equal to and a full satisfaction of all the demands of the said defendants, and of the obligation of the claimant to pay the said 25 per centum of its net earnings during the said period.

The claimant says that the said sums hereinbefore set forth are due, owing, and unpaid, from the United States to the said Union Pacific Railway Company, and the same is now pleaded by way of defense against and satisfaction of any amount that may be found due to the United States on account of all the matters and things set up in the claimant's counter-claim, so far as the same may be necessary to discharge and satisfy the said counter-claim; and for reply to each of the other pleas the said claimant denies each and every allegation thereof.

And for reply to the further plea of the defendants, in which said plea it is alleged that claimant recovered a judgment for $34,623.08 for one-half of mail transportation over the aided 394 miles of the said Kansas Pacific Railway, and the whole of the mail transportation over the non-aided portion of said roads during the first and second quarters of the year 1880, claimant says that it admits that such a judgment was recovered, but is not prepared now to admit that the amount of said judgment is embraced in the amounts set forth in the amended petition and schedules therein referred to, and therefore demands proof of the fact; and the claimant avers that no part of the said sum embraced in said judgment has ever been paid to the claimant by the defendants.

18 And for reply to the further plea of the defendants, in which it is alleged that for one-half of all transportation rendered to the United States by the Union Pacific Railroad Company that had been allowed by the accounting officers prior to the 28th of January, 1876, said company recovered judgment in this court in suits Nos. 9830 and 10899, claimant says that it denies the said allegation, and avers the fact to be that none of the accounts embraced in the present suit referred to in the

said further plea were embraced in the said suits Nos. 9830 and 10899, nor have any of said accounts ever been reduced to judgment.

JOHN F. DILLON,
SHELLABARGER & WILSON,
Attorneys of Claimant.

DISTRICT OF COLUMBIA,
County of Washington, ss:

Before me, R. R. Shellabarger, a notary public in and for the district and county aforesaid, on this the 7th day of January, 1885, personally came Jeremiah M. Wilson, who, being first duly sworn, on his oath says that he is one of the attorneys of the Union Pacific Railway Company, and one of the attorneys engaged in the prosecution of the above-entitled case; that he is familiar with the matters and things involved in the litigation in said case, has read the foregoing replication and knows the contents thereof, and that he believes the facts stated in said replication are true.

JEREMIAH M. WILSON.

Sworn to and subscribed before me this 7th day of January, 1885.
[SEAL.] ROBERT R. SHELLABARGER,
Notary Public, D. C.

19 *Findings of fact.*

These cases having been consolidated and heard together before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I.

The Union Pacific Railroad Company was a corporation duly organized under the act of Congress approved July 1, 1862, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes," and the act amendatory thereof, approved July 2, 1864; and, as such, owned and operated a line of railroad and telegraph extending from Council Bluffs, in Iowa, to Ogden, in the Territory of Utah.

Said company availed itself of the privileges conferred by the act of February 24, 1871, chapter 67 (16 Stat. L., 430) by issuing bonds to the amount of $2,500,000 for the purpose of constructing the bridges contemplated by said act.

The Union Pacific Railroad Company at the outset issued $27,237,000 of the first-mortgage bonds authorized by act of Congress, and the defendants furnished them with a similar amount of Government bonds. The company also issued $10,400,000 of land-grant bonds and $9,268,000 of income bonds. The company disposed of all these at less than par, realizing therefrom, as follows:

$27,237,000 first-mortgage, less discount, $3,494,991.23..	$23, 742, 008	77
$27,237,000 Government bonds, less $91,348.72.........	27, 145, 651	21
$10,400,000 land-grant, less $4,336,007.96.............	6, 063, 992	04
$9,268,000 income, less $2,818,400....	6, 449, 600	00
It also issued stock of par value...	34, 716, 000	00
	98, 117, 252	02

The actual cost of engineering, right of way, building the road, station buildings, shops, tools, equipment, snow-sheds, roadway, track, bridging, fencing, telegraph, express outfit, expense Government commissioners and directors, legal expenses, United States revenue stamps, discount, interest, preliminary expenses, Cedar Rapids and Missouri River Railroad, and interest on bonds during construction, was $63,166,270.27, which left $35,000,000 available for such additions to the equipment and construction as the development of the country and the construction of feeders and tributaries would from time to time render necessary.

20 Claimant made contracts with Hoxie, Ames, Davis, and the Credit Mobilier by which the road cost the railroad company not only the money which was realized from the bonds, but also the $35,000,000 resulting from subscriptions to the stock. The contracts were in terms for the full sum of $98,000,000. The railroad company paid the consideration by turning over to the contractors from time to time the proceeds of the bonds, and checks amounting to $35,000,000, and thereupon the contractors subscribed for the stock amounting to that sum and paid for it in their checks.

For the payment of the checks the company had no cash on hand.

II.

"The Kansas Pacific Railway Company" was a corporation duly incorporated by an act of the legislature of the Territory of Kansas, under the name of "Leavenworth, Pawnee and Western Railroad Company," the name thereof being afterwards changed to "The Union Pacific Railway Company, Eastern Division," and then to "The Kansas Pacific Railway Company;" the said company is the same company named in the said acts of Congress of July 1, 1862, and July 2, 1864, as "The Leavenworth, Pawnee and Western Railroad Company," as entitled to the benefits of said acts of 1862 and 1864; the Kansas Pacific Railway Company owned and operated a railroad from Kansas City, Missouri, to Denver, in Colorado, during the periods hereinafter named.

Said Union Pacific Railway Company, Eastern Division, received from the United States under said act of July 1, 1862, and acts amendatory thereof and supplemental thereto, their bonds of $1,000 each to the amount of sixteen of said bonds per mile, amounting in all to $6,303,000, the last issue being based upon the following affidavit, application, report, indorsement, and order:

UNION PACIFIC RAILWAY CO., EASTERN DIVISION,
Washington, D. C., July 18, 1868.

I, John D. Perry, president of the Union Pacific Railway Company, Eastern Division, being duly sworn, depose and say that I am advised by the chief engineer of the company that twenty (20) additional miles of the railroad and telegraph line of this company are completed in accordance with the act of Congress entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes," approved July 1st, 1862, and the acts amendatory thereof; that said twenty (20) miles begins at a point 380 miles westward from the State line of Kansas and Missouri, and terminates at a point 400 miles westward from said State line, measured along the line of said road, and forms the sixteenth (16) section of said road.

JOHN D. PERRY.

Sworn and subscribed to before me this 18th day of July, 1868.

[NOTARIAL SEAL.] THOS. J. MYERS,
Notary Public.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., October 31st, 1868.

SIR: I have the honor to transmit herewith, for your action, a report dated July 30, 1868, of the commissioners, Messrs. Wm. M. White, Frank P. Blair, and H. B. Buford, appointed by you to examine and report upon the 16th section of twenty miles of the road and telegraph line of the Union Pacific Railway Company, Eastern Division, commencing at the 380th and terminating at the 400th mile post, west from the initial point on the line dividing the States of Missouri and Kansas.

21 On the 30th instant I had the honor to submit to you the report and map of Brevet Major Howell's survey of a route for a railroad from Fort Riley to the one hundredth meridian. The same was accepted and approved by you, and your order, issued thereon, restricts the distance for which this company becomes entitled to the bonds of the United States to $393\frac{9425}{10000}$ miles.

The road and telegraph line of this company has already been accepted for the distance of 380 miles, leaving $13\frac{9425}{10000}$ miles of this section to complete the distance for which the company became entitled to the subsidy in bonds.

The commissioners in their report represent the said section ready for present service, and completed and equipped as a first-class railroad, and that the telegraph line is also completed; and as the said company have paid to the said commissioners the per diem and mileage due them, under the 21st section of the act approved July 27, 1866, on account of their examination thereof, I respectfully recommend the acceptance of the same for a distance of $13\frac{9425}{10000}$ miles, and the issue to said company of bonds and patent for lands due on said $13\frac{9425}{10000}$ miles of road and telegraph line, agreeably to the act approved July 1st, 1862, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean," &c., and the acts amendatory thereof.

I am, sir, with great respect, your ob't servant,

O. H. BROWNING,
Secretary.

The PRESIDENT.

EXECUTIVE MANSION,
Oct. 31st, 1868.

The within recommendations of the Secretary of the Interior are approved, and the Secretary of the Treasury and himself are hereby directed to carry the same into effect.

ANDREW JOHNSON.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., November 2, 1868,

SIR: I have the honor to transmit herewith, for your information, a certified copy of a letter from this Department to the President of the United States, dated the 31st ultimo, respecting the acceptance of 13.9425 miles of the road and telegraph line of the Union Pacific Railway Company, Eastern Division, and of the President's order indorsed thereon; also certified copy of the report of the commissioners on the same, with copies of receipts from said commissioners to said company upon payment of the per diem and mileage due them under the 21st section of the act approved July 27, 1866.

Very respectfully, your ob't servant,
O. H. BROWNING,
Secretary.

Hon. H. MCCULLOCH,
Secretary of the Treasury.

Attached to and as part of said Kansas Pacific Railway is a road from Leavenworth to Lawrence, Kansas, belonging to the claimant, known as the Leavenworth Branch.

III.

"The Denver Pacific Railway and Telegraph Company" was a corporation organized for the purpose of constructing a railroad and telegraph line from the city of Denver, in Colorado, to Cheyenne, in the Territory of Wyoming. (Under and by virtue of an act of Congress approved March 3, 1869, and an act of Congress approved June 30, 1874.)

During the periods hereinafter mentioned the said "Denver Pacific Railway and Telegraph Company" owned and operated a railroad and telegraph line from Denver to Cheyenne.

IV.

On the 24th day of January, A. D. 1880, under and by virtue of the 16th section of said acts of 1862 and 1864, said companies herein-
22 before named entered into articles of union and consolidation under the corporate name of "The Union Pacific Railway Company," a copy of which articles was duly filed in the Department of the Interior on the 26th day of January, A. D. 1880; and thereby, and thereupon, the claimant became a corporation under the said name of "The Union Pacific Railway Company."

At the time of the consolidation of the Union Pacific with the Kansas Pacific and Denver Pacific, on the 24th of January, 1880, there were outstanding 367,623 shares of stock, of the par value of $36,762,300. In 1881 the company disposed of 20 per cent. more stock for cash at par, realizing therefrom $7,352,460. No part of this money was applied to the expenditures of the items in Exhibit D, but all entered into the construction of branch lines of road, which were feeders to said company's road, and in which lines said company was a stockholder and bondholder.

V.

The claimant performed transportation of troops, mails, mail messengers, passengers, munitions of war, supplies, public stores, and telegrams from January 1, 1873, to December, 31, 1882, over the Denver Pacific and Telegraph Division (including the Cheyenne Branch) of the claimant's road from Denver to Cheyenne for the defendants to the amount—

Mails	$51,451 97
Other transportation	37,113 34
	88,565 31

VI.

The claimant performed for the defendants transportation of mails, mail messengers, from January 1, 1873, to December 31, 1882, over the Leavenworth Branch of the claimant's road, amounting to $25,903.23.

VII.

The claimant performed for the defendants transportation of troops, mails, mail messengers, passengers, munitions of war, supplies, public stores, and telegrams from January 1, 1873, to December 31, 1882, over the Kansas Pacific Division of the claimant's road, between Kansas City and Denver, amounting to—

Mails and mail messengers	$1,096,117 05
Other transportation, including Leavenworth Branch	935,827 62
Of which there has been paid in cash	1,657 27

Of these amounts the apportionment between the aided portion of the Kansas Pacific proper on the one hand, and the non-aided portion of the Kansas Pacific and the non-aided Leavenworth Branch on the other, is as follows:

General transportation, aided	$626,402 77
General transportation, non-aided	309,424 85
Total	935,827 62
Mail, aided	681,823 56
Mail, non-aided	414,293 49
Total	1,096,117 05
Mail, Leavenworth Branch	25,903 23

23 Of this sum judgment has been entered for claimant in No. 12380 for $34,623.08.

From these sums the following deduction should be made:

For cash payment on account of general transportation	$1,657 27
For judgment in No. 12380 on account of mails for one-half on aided portion	15,442 83
Full allowance on non-aided	19,180 25

It was not proved what were the exact earnings of the aided and non-aided parts of said division taken separately, and this distribution of earnings of the general transportation, as well as the compensation for mail transportation, is made in proportion to the mileage of each part.

VIII.

The claimant performed for the defendants transportation of mails and mail messengers over the Union Pacific Division of its road from Council Bluffs to Ogden, from January 1, 1876, to June 30, 1878, to the amount as allowed by the Treasury Department of $875,787.

IX.

The claimant performed for the defendants transportation of passengers, munitions of war, supplies, public stores, and telegrams over said Union Pacific Division of claimant's road prior to July 1, 1878, as allowed by the Treasury Department (exclusive of amounts involved in former judgments of this court), $2,039,290.96.

X.

The company's uniform rate for the transportation of passengers between Council Bluffs and Ogden, when said passengers purchase tickets at either of those places, is $78.50 each; but, by contracts with connecting railroad companies, the claimant receives from said companies who sell through tickets at reduced rates from New York, San Francisco, and other places over their own and the claimant's road $54 only for each passenger carried between said Council Bluffs and Ogden upon said through tickets, as its proportion of money paid for the whole through distance.

In computing the compensation set out in Finding IX, the Treasury Department allowed the claimant only $54 for each passenger carried for the defendants, when said passenger did not have a through ticket over its own and other roads, but took the train at Council Bluffs or Ogden upon an order from the defendants' authorized officers to proceed over the road between those places at the charge of the Government.

The difference between $54 allowed as aforesaid and $78.50 claimed by the company for each passenger so transported by the claimant is $2,855.38 for the period covered by this suit.

The court finds that $78.50 is a fair and reasonable rate of compensation to be paid by the defendants for the transportation of a passenger taking a train at Ogden or Council Bluffs and passing over the road between those places, without a through ticket purchased of other roads as aforesaid, and not in excess of the rates charged private parties for the same kind of service.

24 In some instances the requisition for transportation presented to the agents of the company stated on its face that the passenger was bound from seaboard to seaboard, and in others the requisition furnished no information on the subject.

How much of the sum disallowed was for one and how much for the other kind of requisition is not shown, but the company concedes the reduction in the former cases.

XI.

The company's uniform rate, during the time covered by this suit, for the transportation of passengers between Council Bluffs and Omaha, over its bridge and approaches, a distance of 3.97 miles, was 50 cents each, which sum was included in the price of ticket sold for longer or shorter distances. That was a fair and reasonable rate of compensation to be paid by the defendants and not in excess of the rates paid by private parties for the same kind of service.

The Treasury Department did not allow 50 cents for each passenger so transported for the defendants, but in each case, ascertaining over what railroad or public highway the passenger reached Council Bluffs or Omaha, and the rate per mile paid by him over such part of said railroad or public highway as he had thus traveled, the company was allowed only the same rate per mile for transporting such passenger between Council Bluffs and Omaha as he had so paid on the road leading to the bridge. On the roads leading to said bridge the rates per mile are different, and the rates on the same road differ according to distance traveled.

The difference between the amount so allowed by the Treasury Department for the transportation of such passengers for the defendants and that which the company should be allowed if it has a right to charge 50 cents for each passenger so transported during the time above specified, is $3,693.31.

Similar rules were applied by the Treasury Department to the transportation of freight over said bridge, and the disallowance resulting therefrom amounted to $10,885.34. The rate claimed by the company for transportation of freight over said bridge was fair and reasonable, and not in excess of the rates paid by private parties for the same kind of service.

COUNTER-CLAIMS.

XII.

The earnings and expenses of the Union Pacific Division of claimant's road from November 6, 1875, each year, to June 30, 1878, were as follows:

November 6, 1875, to November 5, 1876:

Earnings by transportation, passengers, freight, supplies, &c., for United States	$952,616	13
Other earnings	12,048,348	46
Total	13,000,964	59
Expenses	5,826,629	35
Net earnings	7,174,335	24
5 per cent	358,716	76

25 From November 6, 1876, to November 5, 1877:

Earnings by transportation, passengers, freight, supplies, &c., for United States	$1,029,635	01
Other earnings	11,888,228	08
Total	12,917,863	09
Expenses	5,721,222	76
Net earnings	7,196,640	33
5 per cent. is	359,832	12

From November 6, 1877, to June 30, 1878:

Earnings by transportation, passengers, freight, supplies for United States	527,027	04
Other earnings	7,254,256	77
Total	7,781,283	81
Expenses	3,892,262	06
Net earnings	3,889,021	75
5 per cent	194,451	09

XIII.

The earnings and expenses of $393\frac{15}{16}$ miles of the Kansas Pacific Division of claimant's road, which was aided by the Government, as set out in Finding II, from November 2, 1868, to December 31, 1882, each year, apportioned on a mileage basis between the aided and non-aided portions thereof, there being no proof of the actual earnings of each portion taken separately, were as follows:

From November 2, 1868, to November 6, 1869:

Earnings	$2,031,854	86
Expenses	1,451,470	40
Net earnings	580,384	46
Net earnings 5 per cent	29,019	22

From November 6, 1869, to November 2, 1870:

Earnings	2,395,025	65
Expenses	2,604,447	93

No net earnings.

From November 2, 1870, to November 2, 1871:

Earnings	1,918,289	52
Expenses	1,904,346	53
Net earnings	13,942	99
Net earnings, 5 per cent. of (insufficient to pay annual interest on first-mortgage bonds)	697	15

From November 2, 1871, to November 2, 1872:

Earnings	$2,202,704	60
Expenses	1,446,004	85
Net earnings	756,699	75
Net 5 per cent. of	37,834	99

From November 2, 1872, to November 2, 1873:

Earnings	2,212,842	80
Expenses	1,441,614	52
Net earnings	771,228,	28
Net 5 per cent	38,561	41

26 From November 2, 1873, to November 2, 1874:

Earnings	$1,979,401	77
Expenses	1,114,019	66
Net	865,382	11
Net 5 per cent	43,269	11

From November 2, 1874, to November 2, 1875:

Earnings	1,987,323	86
Expenses	1,147,287	74
Net	840,036	12
Net 5 per cent	42,001	81

From November 2, 1875, to November 2, 1876:

Earnings	1,858,749	48
Expenses	1,178,605	24
Net	680,144	24
Net 5 per cent. or	34,007	21

From November 2, 1876, to November 2, 1877:

Earnings	2,287,947	55
Expenses	1,339,456	81
Net	948,490	74
5 per cent	47,424	54

From November 2, 1877, to November 2, 1878:

Earnings	2,799,914	48
Expenses	1,587,521	25
Net	1,212,393	23
5 per cent	60,619	66

From November 2, 1878, to November 2, 1879:

Earnings	$3, 385, 885	00
Expenses	2, 268, 217	67
Net	1, 117, 667	33
Net 5 per cent	55, 883	37

From November 2, 1879, to November 2, 1880:

Earnings	3, 661, 197	46
Expenses	2, 227, 784	62
Net	1, 433, 412	84
5 per cent	71, 670	64

From November 2, 1880, to December 31, 1881:

Earnings	4, 409, 463	37
Expenses	2, 855, 638	78
Net	1, 553, 824	59
5 per cent	77, 691	23

From December 31, 1881, to December 31, 1882:

Earnings	3, 162, 351	36
Expenses	1, 944, 666	44
Net	1, 217, 684	93
5 per cent	60, 884	25

27 XIV.

The earnings and expenses of the Union Pacific Division of claimant's road from Council Bluffs to Ogden, from July 1, 1878, to December 31, 1878, was as follows:

From July 1 to December 31, 1878:

Earnings—		
By mail transportation	$188, 432	28
By other transportation for the United States.. (Both retained by Treasury Department.)	291, 846	52
By transportation, &c., for other parties	6, 535, 519	76
Amount disallowed for Omaha bridge and difference between through and local rates	1, 611	42
Gross earnings	7, 017, 409	98
Expenses	3, 495, 887	87
Net earnings	3, 521, 522	11

5 per cent. of net earnings		$176, 076 10
Retained by Treasury Department as above		481, 890 22
25 per cent. of net earnings		880, 380 53
5 per cent. of net earnings	$176, 076 10	
Retained by Treasury Department	481, 890 22	
		657, 966 32
		222, 414 21
5 per cent. of net earnings		176, 076 10
Payable in cash for the last half of 1878		398, 490 31
From December 31, 1878, to December 31, 1879:		
Earnings—		
By mail transportation		378, 853 08
By other transportation for the United States		564, 076 86
(Both retained by Treasury Department.)		
By transportation, &c., for other parties		12, 051, 389 65
Amount disallowed for Omaha bridge and difference between through and local rates		3, 399 28
Gross		12, 997, 718 87
Expenses		7, 213, 520 35
Net earnings		5, 784, 198 52
5 per cent. of net earnings		289, 209 93
Retained as above		946, 329 22
25 per cent. of net earnings		1, 446, 048 63
5 per cent. of net earnings	$289, 209 93	
Retained by Treasury Department	946, 329 22	
		1, 235, 539 15
		210, 510 48
5 per cent. of net earnings		289, 209 93
Payable in cash for the year 1879		499, 720 41
28 From December 31, 1879, to December 31, 1880:		
Earnings—		
By mail transportation		$417, 295 82
By other transportation for the United States		608, 725 08
(Both retained by the Treasury Department.)		
By transportation, &c., for other parties		14, 739, 447 13
Amount disallowed for Omaha bridge and difference between through and local rates		4, 693 29
Gross		15, 770, 161 32
Expenses		9, 248, 436 03
Net earnings		6, 521, 725 29

5 per cent. of net earnings		$326,086 26
Retained as above		1,030,714 19
25 per cent. of earnings		1,630,431 32
5 per cent. of net earnings	$326,086 26	
Retained by Treasury Department	1,030,714 19	
		1,356,800 45
		273,630 87
5 per cent. net earnings		326,086 26
Payable in cash for the year 1880		599,717 13
From December 31, 1880, to December 31, 1881:		
Earnings—		
By mail transportation		443,338 31
By other transportation for the United States		556,155 00
(Both retained by the Treasury Department.)		
By transportation, &c., for other parties		16,125,312 64
Amount disallowed for Omaha bridge and difference between through and local rates		2,840 57
Gross		17,127,646 52
Expenses		11,249,497 83
Net		5,878,148 69
5 per cent. of net earnings		293,907 43
Retained as above		1,002,333 88
25 per cent. of net earnings		1,469,537 17
5 per cent. of net earnings	$293,907 43	
Retained by Treasury Department	1,002,338 88	
		1,296,241 31
		173,295 86
5 per cent. of net earnings		293,907 43
Payable in cash for the year 1881		467,203 29
From December 31, 1881, to December 31, 1882:		
Earnings—		
By mail transportation		483,218 51
By other transportation for the United States		438,539 06
(Both retained by the Treasury Department.)		
By transportation, &c., for other parties		16,050,550 95
Amount disallowed for Omaha bridge and difference between through and local rates		2,758 05
Gross		16,975,066 57
Expenses		9,233,768 33
Net		7,741,298 24

	5 per cent. of net earnings		$387,064 91
	Retained as above		924,515 62
29	25 per cent. of net earnings		$1,935,324 56
	5 per cent of net earnings	$387,064 91	
	Retained by Treasury Department	924,515 62	
			1,311,580 53
			623,744 03
	5 per cent. of net earnings		387,064 91
	Payable in cash for the year 1882		1,010,808 94

XV.

In the expenses mentioned in the next preceding finding (XIV) are included all the items set out in Exhibit D hereto annexed.

The court find that all said items were in good faith actually paid out of the earnings of the road, were not charged to construction or building the road nor to capital, and they were necessary expenses for operating the road and keeping the same in repair, and in a proper condition for the transaction of the current business of the road in a profitable and economical manner, although increasing the real value of the company's property to that extent.

The words "operating expenses" have no technical sense accepted by railroad men.

From 1869 the directors of the Union Pacific Company have made annual printed reports to the stockholders, which were furnished to the Government directors, to any one who applied, and were open to inspection to the general public. They were the only official publications that the company made. In these reports the statement of "operating expenses" was invariably kept separate from expenditures for new construction and new equipment. The following extracts from the report of 1879 show the method in which the company, from 1869 to 1882, indirectly have treated the matter in their reports:

"The earnings and expenses for the year 1879 are as follows:

"Gross earnings, including Omaha bridge	$13,201,077 66
"Deduct operating expenses (including taxes)	5,475,503 44
"Surplus earnings	7,725,574 22

"The operating expenses were 41.48 per cent. of the gross earnings.

"The earnings and expenses for the years 1878 and 1879, including Omaha bridge, compare as follows:

	1878.	1879.
Gross earnings	$13,121,272 58	$13.201,077 66
Operating expenses	5,376,586 19	5,475.503 44
Surplus earnings	7,744,686 39	7,725,574 22
Percentage of expenses:		
Earnings	40.98	41.48

"For a more detailed statement of the operating expenses, and a comparison thereof with the year 1878, attention is called to the table hereto appended." "The construction expenditures of 1879 were as follows:"

Then follows a table identical with that of Exhibit D for that year. There is also found in said report a "detailed statement of operating expenses for 1878–1879, the total of which is $5,475,503.44 as aforesaid.

30 Exhibit D has been taken from the books of the company, where it is kept separately, the separation and division by the company being accepted by the defendants for the purposes of this case, the items being the expenditures shown by the books of the company for "new constructions" and "new equipment." Those items have been reported by the company as "surplus earnings," and as so far increasing the value of its property.

The increase of business which demanded these expenditures resulted from the demands of the public, mostly by reason of the construction of feeders by the company tributary to the main line, which opened a wider extent of country, and not from any special demands of the Government.

XVI.

The amounts allowed and retained by the Treasury Department for transportation of mails as aforesaid are a fair and reasonable compensation for the service and not in excess of the rates paid by private parties for the same kind of service.

Exhibit D.

From July 1 *to December* 31, 1878.

Depots:		
Council Bluffs		$26,365 61
Water-works:		
Council Bluffs	$18,045 38	
Omaha	3,421 89	
		21,467 27
Car equipment		25,400 00
Engine " "		17,059 57
Right of way and land damage		2,393 38
Hotels and tenements, Council Bluffs		5,685 61
Round house, Rawlins		9,393 50
		107,764 94
Less general-office building, Omaha		40 18
		107,724 76

Year ending December 31st, 1879.

Depots:		
Council Bluffs		$651 32
Tenements:		
Council Bluffs		35 00
Shops:		
Rail mill, Grand Island		12,532 03
Tools and machinery:		
Plane at Omaha	$755 00	
" " Cheyenne	780 00	
		1,535 00
Water-works:		
Omaha	9,147 61	
Jackson	1,348 80	
Rawlins	12,560 41	
		23,056 82
Locomotive equipments:		
10 Taunton engines, Nos. 181 to 190	83,244 41	
Less 4 engines sold to Utah Southern R. R	24,000 00	
		59,244 41
Car equipments:		
4 box cars	2,600 00	
Royalty on plough and scraper	3,000 00	
		5,600 00
31 Land and right of way:		
Land at Council Bluffs	$1,085 00	
" " Omaha	648 80	
	1,733 80	
Less land at Omaha, sold	2,931 46	
Cr		$1,197 66
		101,456 92

Year ending December 31, 1880.

Depots:		
Passenger sheds at Council Bluffs		$27,901 45
Water-works:		
Millard	$6,509 90	
Julesburg Junction	2,678 72	
Rawlins	3,190 96	
	12,379 58	
Deduct one tank sold Utah Southern R. R	1,000 00	
		11,379 58

Car equipment:			
100 stock-cars		$54,550 00	
100 box-cars		59,550 00	
350 box-cars		213,500 00	
Freight to Council Bluffs		25,341 42	
8 mail cars		48,139 67	
Royalty on Tanner brake		4,000 00	
		405,081 09	
Deduct cars furnished as follows:			
Utah Southern R. R.:			
1 baggage car	$2,200 00		
Omaha and Republican Valley R. R.:			
2 passenger cars	14,000 00		
1 do do	3,000 00		
1 baggage do	5,000 00		
1 caboose	1,400 00		
5 box-cars	3,000 00		
Omaha, Niobrara and Black Hills R. R.:			
2 passenger cars	$4,000 00		
2 baggage and mail	1,200 00		
10 box-cars	6,000 00		
5 coal cars	2,750 00		
Marysville and Blue Valley R. R.:			
1 passenger car	2,000 00		
1 passenger and baggage	2,500 00		
5 box cars	3,000 00		
		50,050 00	
			$355,031 09
Locomotive equipment:			
10 Taunton locomotives, Nos. 191 to 200	70,613 50		
18 Danforth locomotives, Nos. 201 to 218	147,562 01		
Freight to Omaha and fitting for service	18,533 36		
		236,708 87	
Deduct:			
Locomotives furnished to Omaha and Republican Valley R. R. (4)	28,000 00		
Omaha, Niobrara and Black Hills R.R. (2)	14,000 00		

	Marysville and Blue Valley R. R. (1)		$7,500 00		
	Utah Southern R. R. (1)	$7,500			
	Discount on those sold previously	3,750			
			3,750 00		
	1 excavator sold Oregon R. R.		5,952 70		
				$59,202 70	
					$177,506 17
32	Land and right of way:				
	Council Bluffs			$800 00	
	Omaha			1,119 00	
	Elkhorn			137 50	
	Columbus			1,400 00	
	Grand Island			730 00	
				4,186 50	
	Deduct:				
	Received from exchange of land at Elkhorn			194 45	
					3,992 05
	Shops:				
	Addition to foundry, Omaha			4,620 97	
	Rail mill at Grand Island			1,660 47	
	Machine shops at do			75,690 15	
	Bar mill at Laramie			52,281 99	
	Engine-house at Rock Springs			867 35	
	Do. Echo			1,167 35	
	Do. Uintah			1,393 03	
					137,681 31
	Tools and machinery:				
	Blackford drill, punch press, pipe-cutter, bolt-cutter and header, wheel-borer, foundry crane, etc., Omaha			4,860 72	
	Slotting machine, axle-lathe, wheel-borer, etc., at North Platte			5,542 53	
	Punch and shears, Rawlins			1,685 00	
	Driving-wheel lathe, punch and shears, etc., Evanston			6,653 87	
					18,742 12
	Ice-houses:				
	North Platte			1,422 02	
	Cheyenne			1,921 58	
					3,343 60

Coal-sheds:		
Plum Creek	$2,344 34	
Julesburg Junction	3,505 67	
Echo	3,442 56	
Uintah	85 59	
		$9,378 16
Coal-mine track, Carbon		17,485 34
		762,440 87

Year ending December 31, 1881.

Shops:		
Car-shops at Omaha	$61,293 82	
Machine-shops at Grand Island	123,646 00	
Do. North Platte	70,004 00	
Engine-house at Columbus	2,461 61	
Do. Rock Springs	1,142 78	
Do. Echo	2,689 37	
Bar-mill at Laramie	2,824 31	
Blacksmiths' shops at Cheyenne	2,991 61	
		267,053 50
Tools and machinery:		
Omaha:		
Double-head axle lathe, punch and shears, planer, anvils, cast-iron forges, &c	11,195 97	
Grand Island:		
Bolt cutter, planers, blower, swing lathes, axle lathe, Knowles pump, punch and shears, emery grinders and wheels, etc., etc	32,523 39	
North Platte:		
Large wheel lathe and punch, upright drill, swing lathe, hydraulic press, planer, steam hammer (complete), 1 Harrington drill, etc., etc	12,417 08	
Cheyenne:		
Wheel boxes, axle lathe, etc	2,957 53	
Laramie:		
Emery grinders and wheels, Putnam lathe, planer, slotter, etc., etc	3,673 10	
33 Rawlins:		
Emery grinders and wheels, Fox lathe, swing lathe, planer, &c	$5,886 65	
Evanston:		
Emery grinders, planer, &c	665 30	
		$69,319 02

Water-works:		
Clark's	$4,870 55	
Gibbon	4,939 91	
Kearney Junction	4,683 32	
Antelope	3,757 73	
Granite Cañon	8,333 53	
Carbon	1,582 87	
Dana	66 33	
Fillmore	11,328 68	
Rawlins	5,045 36	
Salt Wells	5,714 78	
Rock Springs	276 49	
Table Rock	10,774 16	
Evanston	1,499 56	
Echo	2,762 95	
		$65,636 22
Car equipment:		
200 box cars	169,276 00	
300 flat cars	131,872 00	
300 stock cars	165,000 00	
800 box cars	452,161 00	
12 passenger cars on account	50,000 00	
6 baggage cars	22,052 10	
16 cabooses	23,650 75	
Freight on cars	6,527 60	
Royalty on patent safety gate	1,250 00	
	1,021,789 45	
Less rebate on freight charges in 1880	6,610 48	
	1,015 178 97	
Deduct:		
Equipment furnished Colorado Central R. R. Co. for Julesburg Branch, viz—		
4 eight-wheel locomotives	48,000 00	
6 ten-wheel "	82,500 00	
2 first class coaches	12,000 00	
2 second-class coaches	10,500 00	
2 baggage cars	7,350 00	
2 express "	7,350 00	
225 box "	126,000 00	
75 stock "	42,000 00	
100 flat "	42,500 00	
100 coal "	45,000 00	
5 postal "	27,500 00	
7 cabooses "	10,332 00	
	461,032 00	
		554,146 97

Locomotive equipment:		
26 Taunton locomotives, Nos. 233 to 258	$235,300 00	
15 Baldwin locomotives, Nos. 219 to 233	160,500 00	
Freight to Omaha and fitting for service	13,850 96	
Air and automatic brakes	3,559 26	
		$413,210 22
Land and right of way:		
Omaha	16,348 45	
Elkhorn	3,000 00	
Almy	200 00	
	19,548 45	
Deduct:		
Received for damages awarded for crossing track, and lot 7, block 156, Omaha	1,000 00	
		18,548 45
34 Coal-sheds:		
Columbus	1,584 05	
Denver Junction	3,357 70	
Medicine Bow	11,837 01	
Echo	3,482 77	
		$20,261 53
Buildings:		
Depot at Shelton	2,064 15	
Eating-house at Rock Creek	8,500 00	
Tenement at Denver Junction	1,340 19	
" " Carbon	1,058 18	
" " Rock Springs	1,215 25	
" " Green River	633 20	
Ice-house " Council Bluffs	163 58	
" " Omaha	2,852 37	
" " Ogden	332 44	
		18,159 36
Stock-yards at Omaha	7,150 00	
Coal-mine track at Carbon	1,332 00	
		8,482 00
		1,434,817 27
Less Grand Island precinct bonds, account location of shops		25,000 00
		1,409,817 27

Year ending December 31, 1882.

Shops:	
Grand Island	$36,965 14
North Platte	33,539 29
Evanston	3,888 25
Omaha (car-shops)	36,802 14

Evanston do	$224 52	
Green River do	343 72	
		$111,763 06
Tools and machinery:		
Grand Island	25,860 46	
Omaha	23,076 62	
Laramie	2,815 86	
Rawlins	2,752 80	
Green River	887 00	
Evanston	6,519 37	
North Platte	3,356 88	
Cheyenne	278 00	
		65,546 99
Water-works:		
Tremont	1,253 79	
Carbon	2,165 43	
Rawlins	404 85	
Fillmore	634 05	
Table Rock	1,323 40	
Salt Wells	431 78	
Harper's	235 06	
		6,448 36
Round-house, Columbus		329 60
Buildings:		
Ice-houses at Council Bluffs	1,485 79	
Ice-houses at Omaha	207 00	
Ice-houses at Ogden	114 91	
Charcoal-house, Omaha	346 02	
Tenement, Rock Springs	644 58	
Store-room, Evanston	445 45	
Paint mill, Omaha	475 24	
Paint-mill machinery	620 02	
Coal chutes, Columbus	1,976 05	
Coal chutes, Medicine Bow	4,944 54	
Coal platform, Grand Island	146 90	
		11,406 50
Real estate at Omaha	30,625 00	
Less 2 old houses at Omaha, sold	500 00	
		30,125 00
35 Car equipment:		
12 coaches from Pullman Palace Car Co	$25,082 08	
25 refrigerator cars, Nos. 9700 to 9748 (even Nos.)	26,250 00	
Royalty on 25 refrigerator cars	625 00	
100 20-ton platform cars (built by Co.)	61,735 23	
2 20-ton box cars "	1,431 60	
25 way cars "	37,620 75	
5 mail cars "	29,483 30	
1 baggage car "	3,685 45	
	185,913 41	

Deduct:			
30 flat cars	$13,290 00		
1 portable tank sold Salt Lake and Western R'y	800 00		
	14,090 00		
U. P. box-car No. 5432, destroyed by W. S. L. and P. R'y at Ritchie	385 49		
Rebate on springs from Detroit	1,100 00		
		$15,575 49	
			$170,337 92
			395,957 43
Locomotive equipment:			
6 Taunton locomotives, Nos. 49, 51, 54, 55, 65, and 123		82,500 00	
5 locomotives, Nos. 125, 144, 145, 260, and 261		75,000 00	
1 locomotive, No. 9, built at Omaha		7,171 90	
Freight and fitting locomotives		7,601 49	
		172,273 39	
Deduct:			
Locomotive sold Salt Lake and Western R'y—			
1 10-wheel engine, No. 54	13,750 00		
Sold Utah Central R. R., engine No. 65	13,750 00		
Sold Oregon Short Line R. R.—			
8 8-wheel engines, Nos. 19, 20, 16, 43–'5, 47, and 18	76,000 00		
6 10-wheel engines, Nos. 55, 51, 235, 49, 123, 140	82,500 00		
		186,000 00	
			13,726 61
			382,230 82

RECAPITULATION.

July 1 to December 31, 1878	$107,724 76
Year ending December 31, 1879	101,456 92
Year ending December 31, 1880	762,440 87
Year ending December 31, 1881	1,409,817 27
Year ending December 31, 1882	382,230 82
	2,763,670 64

Conclusions of law.

Upon the foregoing findings of fact the court decides as conclusions of law as follows:

The Kansas Pacific Railway, so far as the same was aided by the United States by the issue of bonds, was completed on the 2d of November, 1868.

The claimant is entitled to be paid for—

Mails and other transportation over Denver Pacific (including Cheyenne)		$88,565 31
Mails and mail messengers over the Leavenworth Branch		25,903 23
36 Mails and mail messengers over the non-aided branch of Kansas Pacific	$414,293 49	
Less judgment in 12380	19,180 25	
		$395,113 24
One-half of mails on Kansas Pacific on aided	340,911 78	
Less judgment in 12380	15,442 83	
		325,468 95
Amount allowed on the non-aided Kansas Pacific, including Leavenworth Branch, general transportation other than mail	309,424 85	
Deduct cash payments	1,657 27	
		307,767 58
One-half general transportation other than mail on aided Kansas Pacific		313,201 38
One-half amounts allowed mails and mail messengers over Union Pacific to June 30, 1878		437,893 50
One-half amounts allowed for general transportation to July 1, 1878, on Union Pacific		1,015,145 18
One-half amounts disallowed by Treasurer for transportation over Omaha bridge, and difference between local and through fares		1,065 71
		2,910,124 08

Counter-claim.

The defendant's are entitled to be paid as follows:

5 per cent. of net earnings of Union Pacific: From November 6, 1875, to November 5, 1876	$358,716 76
5 per cent. of net earnings of Union Pacific: From November 6, 1876, to November 5, 1877	359,832 02
5 per cent. of net earnings of Union Pacific: From November 6, 1877, to June 30, 1878	194,451 09
5 per cent. of the net earnings of the aided portion of the Kansas Pacific Railway, from November 2, 1868, to December 31, 1882	598,867 44
Cash payment on Union Pacific: From July 1, 1878, to December 31, 1878	398,490 31
Cash payment on Union Pacific:	
For year 1879	499,720 41
For year 1880	599,717 13
For year 1881	467,203 29
For year 1882	1,010,808 94
	4,487,807 39

On the whole case.

The defendants are entitled to judgment for the difference, amounting to $1,577,683.31.

Opinion.

Richardson, *C. J.*, delivered the opinion of the court:

The claimant's railroad is composed of three divisions:

1. The Union Pacific Division, originally incorporated under the act of July 2, 1862 (12 Stat. L., 489, ch. 120), amended by the act of July 2, 1864 (13 Stat. L., 356), from Council Bluffs to Ogden. This division was aided by the United States by bonds for each mile of the road.

2. The Kansas Pacific Division, extending from Kansas City to Denver, was aided by the United States by bonds for each of $393\frac{15}{16}$ miles, and not aided for the remaining $245\frac{1}{6}$ miles.

3. The Denver Pacific Division, extending from Denver to Cheyenne, and that division was not aided by the United States.

The act of 1862, section 6, required the company to perform transportation for the Government at fair and reasonable rates of compensation, not exceeding the amounts paid by private parties for 37 the same kind of service, that all compensation for such services should be applied to the payment of the bonds which it had received from the defendants, with interest, until the whole amount should be fully paid, and that after the road should be completed and until the bonds and interest were paid at least 5 per centum of the net earnings of the road should be annually applied to the payment thereof.

By the act of 1864, section 5, only one-half of the compensation for services rendered to the Government by the company was required to be applied to the payment of the bonds issued by the defendants, to aid in the construction of the road.

The act of 1878, May 7, ch. 96 (20 St. L., 56), commonly called the Thurman act, requires the whole amount of compensation due from the Government after June 30, 1878, to be retained by the defendants and makes some other provisions hereafter mentioned.

These provisions apply not only to the Union Pacific Division, but also to the $293\frac{15}{16}$ miles of the Kansas Pacific Division, which were aided by the Government. They do not apply to the other $245\frac{1}{6}$ miles of said road, nor to the Denver Pacific Division.

The claimant brings this action to recover the whole compensation for services rendered to the Government over the non-aided Denver Pacific Division and the non-aided portion of the Kansas Pacific Division to December 31, 1882, and one half of the compensation for services rendered to the Government over the Union Pacific Division, and the aided portions of the Kansas Pacific Division to June 30, 1878, when the provisions of the Thurman act took effect.

In this branch of the case the principal controversy was as to amount of compensation to which the claimant was entitled for carrying the mails over the aided portions of its road, under the act of 1862. The Treasury Department in making up the account for carrying the mails has allowed to the claimant the maximum rates established by law for the same kind of service by non-aided railroads, less the deduction made and fines imposed by the Postmaster-General. The claimant demands a much greater rate, and the Assistant Attorney-General contends for a much less rate.

The court has found as a fact that the rates allowed by the Treasury Department are fair and reasonable, and not in excess of the rates paid by private parties for the same kind of service. No question of law arises upon that finding.

There are, however, two questions of law involved in this branch of the case:

1. The claimant has arrangements with the companies of connecting roads by which said companies sell through passenger tickets at reduced rates from New York, San Francisco, and other places over their own and the claimant's road, and pay to the claimant, as its proportion of the through fare between Council Bluffs and Ogden, $54 each. All passengers buying tickets at Council Bluffs or Ogden and taking passage over the claimant's road between those places are charged $78.50. This rate is claimed by the company for every passenger taking passage in like manner at either of those places and traveling for and at the expense of the Government over its road, and not having purchased a through ticket
from other places on other railroads, or not having a requisition
38 showing that he was traveling over such other roads in connection
with the claimant's road.

The court has found that $78.50 is a fair and reasonable compensation for the transportation of a passenger purchasing a ticket at Council Bluffs or Ogden and traveling over the road between those places, and so far as it is a question of fact that it is not in excess of the rate paid by private parties for the same kind of service. The question now is as a matter of law, if it be a question of law, whether the defendants are bound to pay $78.50 or only $54 for each of their passengers so transported. The Treasury Department have allowed only the latter sum.

In our opinion the defendants are bound to pay the same rate for each of its passengers so transported as is paid by private parties taking the train in like manner, at the same places, and traveling over the same parts of its road, that being found to be a fair and reasonable compensation; and that when these passengers do not purchase through tickets, and do not have requisitions showing that they are travelling over other roads in connection with the claimant's road, but travel as local passengers, the defendants cannot have them transported at the same rates as the company receives, in its division with other companies, for the transportation on through tickets over its own and other roads.

2. The claimant's uniform rate for the transportation of a passenger between Council Bluffs and Omaha, a distance of 3.97 miles, over its bridge and approaches, was 50 cents during the time involved in this branch of the case. The court has found as a fact that 50 cents for each of the passengers traveling at the expense of the United States was a fair and reasonable compensation, and not in excess of the rate paid by private parties for the same kind of service.

But the Treasury Department has allowed in its accounts much less rates, not uniform, but varying according to the rate per mile paid by the passenger over the connecting road by which he reached the claimant's road. This latter rate was different over different roads and different over the same road, according to the distance traveled thereon. This, it is urged on the part of the defendants, they have a right to do, by reason of the provisions of the act of February 24, 1871, chap. 67 (16 Stat. L., 430), the privileges of which the claimant has availed itself of by building its bridge and issuing its bonds in accordance therewith, and which provides that—

"Said bridge may be so constructed as to provide for the passage of ordinary vehicles and travel, and said company may levy and collect tolls and charges for the use of the same; and for the use and protection of said bridge and property the Union Pacific Railway Company shall be empowered, governed, and limited by the provisions of the act entitled 'An act to authorize the construction of certain bridges and to establish them as post-roads,' approved July twenty-five, eighteen hundred and sixty-six, so far as the same is applicable thereto."

The act thus referred to is chapter 246 of 1866 (14 Stat. L., 245), of which section 3 is as follows:

"Any bridge constructed under this act, and according to its limitation, shall be a lawful structure, and shall be recognized and known as a post-route, upon which, also, no higher charge shall be made for the transportation over the same of the mails, the troops, and the munitions of war of the United States, than the rate per mile paid for the transportation over the railroads or public highways leading to the said bridge."

In our opinion the words "for the use and protection of said bridge and
property" in the act of 1871, to which any bridge built under its
39 provisions was made subject to the act of 1866, do not apply to the
rates of compensation to be paid by the defendant for the transportation of their passengers between Council Bluffs and Omaha, a distance of 3.97 miles over the claimant's road, within which this bridge is constructed.

In the case of the Union Pacific Railroad Company v. Hall et al. (91 U. S. R., 343), the Supreme Court decided that the bridge constructed by the company between Omaha and Council Bluffs became part of its road, and that it was bound to run and operate the whole road, including the bridge, as one connected and continuous line.

When the bridge was built it became subject to the act of 1862, wherein it was provided that transportation for the Government should be at fair and reasonable rates, and not in excess of those paid by private parties for the same kind of service. We do not think that Congress intended by the act of 1871 to supersede or modify this provision as to any part of the claimant's road.

This disposes of all the controverted questions arising on the causes of action set out by the claimant. The conclusion therefore is that the claimant is entitled to recover for all the services performed by it for the defendant over the Denver Pacific Division and its branches (set out in Findings V, VI, and VII), and over the non-aided portion of the Kansas Pacific Division to December 31, 1882; also one-half for its services over the aided part of said Kansas Pacific Division and over the Union Pacific Division, aggregating $2,910,124.08.

The defendants have filed a set-off and counter-claim to recover of the claimant under the act of 1862, 5 per cent. of the net earnings of the aided part of the Kansas Pacific Division, from November 2, 1868, to December 31, 1882, and 5 per cent. of the net earnings of the Union Pacific Division from November 6, 1875, to June 30, 1878, when the Thurman act took effect, and made additional provisions on the subject of payments by the company.

On this branch of the case the only controversy was as to the compensation to be *be* allowed and computed as part of the gross earnings for carrying the mails. This the court has found to be the same as allowed by the Treasury Department.

There was formerly a controversy between the parties as to whether certain items of expenditure, partly in the nature of permanent improvements should be deducted from the gross earnings in determining the net earnings, upon which the 5 per cent. was to be calculated. But that controversy was terminated as to earnings before the passage of the Thurman act by the decision of the Supreme Court in Union Pacific Railroad Company v. United States (99 U. S. R., 402), and we have followed that decision in all its parts in finding the facts in that part of these cases.

The defendants set up further counter-claims to recover under the act of 1862, 5 per cent. of the net earnings of the Union Pacific Division, from June 30, 1878, to December 31, 1882, and so much of $850,000 each year as with said 5 per cent., and the whole compensation for services for the Government, will make with said two items equal 25 per cent. of the net earnings, under the requirements of section 1 of the Thurman act of May 7, 1878 (ch. 96, 20 Stat. L. 56).

In addition to the controversy as to the compensation to be allowed for carrying the mails, which is settled by the findings of fact, a question
40 tion of law is involved as to whether or not certain items of expenditure, partly in the nature of permanent improvements (set out in Schedule D), shall be deducted from the gross earnings in determining the net earnings under the language of the Thurman act.

In the case of the Union Pacific Railroad Company v. the United States (99 U. S. R., 402) above cited, the Supreme Court decided that under the act of 1862, in determining the net earnings there was to be deducted from the gross earnings expenditures which the company had actually paid out of its earnings for the following objects:

1, station buildings; 2, shops and fixtures; 3, equipment; 4, Government commissioners; 5, fencing; 6, snow-sheds and fences; 7, express outfit; 8, engineering; 9, bridging; 10, car-shops and sheds; 11, roadway and track; 12, hotels; 13, tenements; 14, coal-sheds; 15, Omaha depot buildings; 16, Omaha general offices; 17, real estate; 18, Laramie rolling mill; 19, water-works.

Between July 1, 1878, and December 31, 1882, the company paid out of its earnings the sum of $2,763,670.64 for equipment and improvements of one or another description specified in those nineteen items, as shown by Exhibit D, and it claims a legal right, in ascertaining its net earnings during that period, to deduct that anount from its gross earnings during the same period.

If the act of May 7, 1878 (20 Stat. L., 56, ch. 96), commonly called the "Thurman act," had not been passed, the Supreme Court's decision would be conclusive in favor of the company's claim to that deduction; but it is contended for the Government that a different rule is prescribed by that act. Whether this is so or not is the question we are required to decide.

Section 1 of the Thurman act reads as follows:

"That the net earnings mentioned in said act of eighteen hundred and sixty-two, of said railroad companies respectively, shall be ascertained by deducting from the gross amount of their earnings, respectively, the necessary expenses actually paid within the year in operating the same and keeping the same in a state of repair, and also the sum paid by them, respectively, within the year in discharge of interest on their first-mortgage bonds, whose lien has priority over the lien of the United States, and excluding from consideration all sums owing or paid by said companies, respectively, for interest upon any other portion of their indebtedness; and the foregoing provision shall be deemed and taken as an amendment of said act of eighteen hundred and sixty-four, as well as of said act of eighteen hundred and sixty-two. This section shall take effect on the thirtieth day of June next, and be applicable to all computations of net earnings thereafter; but it shall not affect any right of the United States or of either of said railroad companies existing prior thereto."

The question growing out of this provision is mainly connected with the use of the word "necessary" along with the words "expenses actually paid . . . in operating" the road. The company claims that the expenses embraced in the aforesaid sum of $2,763,670.64, were necessary within the meaning of the statute; the Government contends that they were not.

Were the word "necessary" omitted, it could not, we think, be justly questioned that the ruling of the Supreme Court would directly apply to and fully sustain the company's position. Does the insertion of that word change the aspect of the case in this regard? In answering this question we must, of course, endeavor to get at the meaning of the word in that connection.

In McCulloch v. Maryland (4 Wheaton, 316), Chief-Justice
41 Marshall, in delivering the opinion of the Supreme Court on one
of the gravest questions of constitutional law ever brought before

that tribunal, considered the meaning of the word in that clause of the Constitution which gives Congress the power "to make all laws which shall be necessary and proper for carrying into effect the foregoing powers, and all other powers vested by this Constitution in the Government of the United States;" and in discussing that meaning he used language which we consider fairly applicable here.

The position taken in the argument of that case, and which the court deemed it necessary to meet, was, that the word "necessary" limited the right to pass laws for the execution of the granted powers to such as are indispensable, and without which the power would be nugatory. This is, substantially, the claim of the Government in the present case, in construing the Thurman act. If we sustain it we can allow the company only, first, expenses of repair; and, secondly, expenses indispensable to the mere operating of the road as a highway of traffic, without permittting it to meet, out of its earnings, the growing demands of an ever-increasing business, and so keep itself ready and able to respond efficiently to those demands.

The Supreme Court expounded the meaning of the contested word as follows:

"Is it true that this is the sense in which the word "necessary" is always used? Does it always import an absolute physical necessity so strong that one thing to which another may be termed necessary cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end is generally understood as employing any means calculated to produce the end, and not as being confined to those single means without which the end would be entirely unattainable. Such is the character of human language that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction that many words which import something excessive should be understood in a more mitigated sense—in that sense which common usage justifies. The word "necessary" is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison, and is often connected with other words which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phrases. . . . This word, then, like others, is used in various senses; and in its construction the subject, the context, the intention of the person using them, are all to be taken into view."

And again, in the legal-tender case (110 U. S., 421–440), the Supreme Court said, in reference to the same words in the Constitution:

"By the settled construction and the only reasonable interpretation of this clause, the words "necessary and proper" are not limited to such measures as are absolutely and indispensably necessary, without which the powers granted must fail of execution; but they include all appropriate means which are conducive or adapted to the end to be accomplished, and which in the judgment of Congress will most advantageously effect it."

In the light of these expressions, we feel quite justified in considering the word "necessary" in the Thurman act untrammeled by any rigorous obligation to impose on it a severely restrictive sense.

The Union Pacific Railroad, in the words of the Supreme Court, "was a national work, originating in national necessities, and requiring national assistance. . . . Although this road was a military necessity, there were other reasons active at the time in producing an opinion for its completion besides the protection of an exposed frontier. There was a vast unpeopled territory lying between the Missouri and Sacramento Rivers, 41½ which was practically worthless without the facilities afforded by a railroad for the transportation of persons and property. With its construction the agricultural and mineral resources of this territory could be developed, settlements made where settlements were possible, and thereby the wealth and power of the United States largely increased; and there was also the pressing want, in time of peace even, of an improved and cheaper method for the transportation of the mails, and of supplies for the Army and the Indians. It was in the presence of these facts that Congress undertook to deal with the subject of this railroad" (United States vs. Union Pacific R. R. Co., 91 U. S., 72.)

We cannot lose sight of these views in the consideration of the present controversy without doing probable injustice to both the legislature and the company. We cannot regard this subject in a cramped or jealous spirit; nor, on the other hand, can we treat it in a spirit of inconsiderate liberality. Our inquiry is, What may the intention of Congress be fairly considered to have been in the use of the words "necessary expenses in . . . operating" the road?

The answer to this involves, also, the meaning to be ascribed to the word "operating."

In its restricted sense, it might be confined to the mere running of trains over the road, and the ordinary incidents thereof; but we do not feel bound so to limit it. We think it was intended by the legislature to be understood in its larger and more comprehensive sense of fully performing the greater work which the road was intended to do, in promoting the reclaiming, peopling, and developing of "a vast unpeopled territory . . . which was practically worthless without the facilities afforded by a railroad for the transportation of persons and property."

However viewed, it was quite certain, in the light of all experience, that there would be a growth in the business of this road. It was not supposable that its traffic would remain stationary for any length of time. As settlements were made along the line its business would increase; in what ratio time alone could determine. Is it reasonable to suppose that this was not foreseen by Congress? And if foreseen, is it fair to assume that that body intended to enact provisions which would obstruct the efforts of the company to meet the increase? We think not. On the contrary, we are led to the opposite conclusion. It seems to us clear that when, in the Thurman act, that body used the terms "necessary expenses . . . of operating" the road, it referred to the expenses of operating it, in all respects, pari passu with all the fair and legitimate demands of the business coming to it; and the word "necessary" was not meant in its most stringent and restrictive import, but in the sense of limiting the company to such expenses as were bona fide conducive or adapted to that end, and to exclude those which were not. And this leads us to the ultimate conclusion that those words in the Thurman act do not in reality make a rule different from that indicated by the Supreme Court in 99 U. S., 402. The outlays which were there approved included all kinds of expenditures which the company now claims a right to deduct from its gross earnings in the process of ascertaining the amount of its net earnings. Hence, in our opinion, the company is just as much entitled to deduct them now as it would be if that act had not been passed.

Therefore, our judgment is, that the company is entitled, in ascertaining the net earnings between July 1, 1878, and December 31, 1882, to
41¾ deduct from the gross earnings of that period the sum of
$2,763,670.64 on account of the items set out in Schedule D, and actually paid by it out of earnings for equipment and improvements, and in the computation of the net earnings the court has included all those items in necessary expenses of operating and keeping the road in repair.

Another question of law is raised on the construction of that part of the Thurman act which requires the company to pay certain money into the Treasury of the United States.

Section 2 requires one-half of the whole amount of compensation which may, from time to time, be due to the Union Pacific Railroad Company, for services rendered to the Government, returned by the defendants, to be turned into the sinking fund thereinafter provided, for the uses therein mentioned; and section 3 of the act establishes and regulates that fund.

Section 4 provides as follows:

"That there shall be carried to the credit of the said fund, on the first day of February in each year, the one-half of the compensation for services hereinbefore named, rendered for the Government by said Union Pacific Railroad Company, not applied in liquidation of interest; and, in addition thereto, the said company shall, on said day in each year, pay into the Treasury, to the credit of said sinking fund, the sum of eight hundred and fifty thousand dollars, or so much thereof as shall be necessary to make the five per centum of the net earnings of its said road payable to the United States under said act of eighteen hundred and sixty-two, and the whole sum earned by it as compensation for services rendered for the United States, together with the sum by this section required to be paid, amount in the aggregate to twenty-five per centum of the whole net earnings of said railroad company, ascertained and defined as hereinbefore provided for the year ending on the thirty-first day of December next preceding."

We do not feel called to enter on an extended discussion of the section, but will state in brief terms our view of it.

It seems quite clear to us that the purpose of that act was not to alter the provision of the act of 1862 requiring 5 per cent. of the net earnings to be paid into the Treasury, but to add thereto so much of $850,000 each year as with said 5 per cent., and the whole compensation for services performed for the Government, should equal 25 per cent. of its net earnings, and no more.

In accordance with these views the defendants are entitled to recover on their counter-claim, as set out in Findings XII and XIII, the sum of $4,487,807.39; deducting the amount recoverable by the claimant, $2,910,124.08 leaves a balance in favor of the defendants of $1,577,683.31 for the purposes set forth in the acts of 1862, 1864, and 1878.

On the whole case the judgment of the court is that the defendants are entitled to judgment against the claimants for that difference, and it will be so entered of record.

NOTE.—Chief-Justice Drake was present at the trial and determination of this case, concurred in the findings of fact and conclusions of law adopted by the court, and was engaged in the preparation of the opinion thereon when he availed himself of the benefit of section 714 of the Revised Statutes by resigning his office January 12, 1885, in the seventy-fourth year of his age, and the fifteenth of his service as Chief-Justice. So much of the foregoing opinion as refers to the matter of the ascertainment of the net earnings of the road was prepared by him.

NOTT, *J.*, being an executor of an estate which held some of the stock of the claimant's company took no part in the decision.

42 *Judgment.*

THE UNION PACIFIC RAILWAY COMPANY
v.
THE UNITED STATES.
} Consolidated under No. 14389.

At a Court of Claims held in the city of Washington on the first day of June, 1885, it was ordered that in accordance with the opinion delivered herein by Richardson, chief-justice, on the second day of February, A. D. 1885, judgment be entered as follows:

43 The court on due consideration of the premises, both for and against the United States and the claimant, find upon the petition of the said claimant that the United States are indebted to the said claimant in the sum of two million nine hundred and ten thousand one hundred and twenty-four $\frac{08}{100}$ dollars, and that upon the counter-claim of the defendants the said claimant is indebted to the United States in the sum of four million four hundred and eighty-seven thousand eight hundred and seven $\frac{39}{100}$ dollars, and that upon the whole case the said Union Pacific Railway Company is indebted to the United States for the difference in the said sums, to wit, for one million five hundred and seventy-seven thousand six hundred and eighty-three $\frac{31}{100}$ dollars 1,577,683$\frac{31}{100}$, and it is therefore ordered, adjudged, and decreed that the United States do recover of and from the Union Pacific Railway Company the sum of one million five hundred and seventy-seven thousand six hundred and eighty-three dollars and *and* thirty-one cents (\$1,577,683$\frac{30}{100}$).

44 *Defendants' appeal.*

THE UNION PACIFC RAILWAY COMPANY
v.
THE UNITED STATES.
} Nos. 11901, 12815, 14389.

The defendants in the above-entitled case object to the finding of the court allowing claimant the sum of \$2,910,124.08, and pray an appeal to the Supreme Court of the United States from so much of the judgment herein as allows to claimant that sum.

ROBERT A. HOWARD,
Assistant Attorney-General.

Filed Aug. 21st, 1885, A. H.
Allowed Sep. 2nd, 1885,

WILLIAM A. RICHARDSON,
Chief-Justice.

45 *Claimant's appeal.*

THE UNION PACIFIC RAILWAY CO.
vs.
THE UNITED STATES.
Nos. 11901, 12515, 14389.

And now comes the claimant in the above-entitled causes (consolidated), and prays an appeal to the Supreme Court of the United States from the judgment rendered therein against the claimant.

JOHN F. DILLON,
SHELLABARGER & WILSON,
Attys. of Claimant.

Filed Aug. 22nd, 1885, A. H.
Allowed Sep. 2nd, 1885.

WILLIAM A. RICHARDSON,
Chief-Justice.

46 In the Court of Claims.

THE UNION PACIFIC RAILWAY COMPANY
vs.
THE UNITED STATES.
No. 14389.

I, Archibald Hopkins, Chief Clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusion of law thereon, of an order of consolidation, of the appeals of both parties and the allowance of the same and of the judgment of the court therein.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this eighth day of October, 1885.

[SEAL.] ARCHIBALD HOPKINS,
Chief Clerk Court of Claims.

(Indorsement on cover:) No. 1034. The Union Pacific Railway Company, appellant, vs. The United States, and No. 1035, The United States, appellant, vs. The Union Pacific Railway Company. Court of Claims. Filed October 8, 1885.

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CLERK.

IN THE SUPREME COURT OF THE UNITED STATES.

THE UNION PACIFIC RAILWAY COMPANY,
Appellant,
vs.
THE UNITED STATES.

No. 1034.

Appeal from the Court of Claims.

Petition of the Appellant Railway Company that the Cause be remanded to the Court of Claims, for Specific Findings of Fact in the Nature of a Special Verdict, upon the Subject of the Proper Measure of Compensation for Mail-service.

JOHN F. DILLON AND
SHELLABARGER & WILSON,
Attorneys for Appellant.

C. G. BURGOYNE, "Quick" Print, 146, 148 & 150 CENTRE ST., N. Y.

IN THE

Supreme Court of the United States.

THE UNION PACIFIC RAILWAY COMPANY,
Appellant,

AGAINST

THE UNITED STATES.

No. 1034.
Appeal from the Court of Claims.

Petition of said Railway Company.

To the Honorable the Supreme Court of the United States.

YOUR PETITIONER, THE UNION PACIFIC RAILWAY COMPANY, appellant in the above-entitled cause, respectfully represents:

I.

That by an act entitled "An Act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean and to secure to the Government the use of the same for postal, military and other purposes" (12 Stats. at Large, 489), it was among other things stipulated and agreed in the sixth section of said act, between the United States and the Union Pacific Railroad Company, that the said company should transport the mails of the United States whenever required to do so " at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of services " (section 6, Act July 1, 1862).

II.

That the appellant, under and pursuant to the said stipulation and agreement, transported the mails over its line of road between Council Bluffs, in the State of Iowa, and Ogden, in the Territory of Utah, prior and up to the 30th day of June, 1878, and brought suit in the Court of Claims to recover compensation for the said service at fair and reasonable rates as stipulated to be paid in the said agreement (see printed record in this case, p. 3, paragraph 7).

III.

That in answer to the claimant's petition the defendant therein, among other defenses, set up a counterclaim, in which it was averred that the said claimant, appellant herein, was indebted to the United States in a large sum of money on account of five per cent. of the net earnings of the said railroad company stipulated to be paid to the United States in and by the act aforesaid for the period up to the 30th day of June, 1878 (see R., p. 7); and likewise claimed against the appellant a large sum of money as being due to the said defendant, appellee, on account of twenty-five per cent. of its net earnings from the said 30th day of June, 1878, to the 31st day of December, 1882 (R., pp. 7 and 8).

IV.

In reply to said counterclaim the said claimant, appellant, averred a payment thereof in substance as follows, to wit: That during the said period from the 30th day of June, 1878, to the 31st of December, 1882, the United States became and was indebted to appellant in a large sum of money for the transportation of mails over the road aforesaid, and claimed compensation therefor at fair and reasonable rates, not exceeding the amounts paid by private parties for the same kind of service (R., p. 9).

V.

Your petitioner further represents and shows to the Court, that by virtue of the pleadings above referred to, and as will more fully appear by reference to the printed record in said cause, it became, as it is advised by counsel, material and important to the proper determination of the issues involved, that the Court should determine what was such fair and reasonable compensation for the transportation of the mails during the period covered by the averments of said pleadings as hereinbefore set forth, one of the issues joined between the parties litigant in the said Court of Claims being what was a fair and reasonable compensation for the services so rendered, not exceeding the amounts paid by private parties for the same kind of service.

VI.

Your petitioner further represents that under and by virtue of sections 4001, 4002 and 4004 of the Revised Statutes, the Postmaster-General had fixed a uniform rate of compensation as applicable to all the railroads of the United States, and had fixed the rate of compensation for appellant according to the same method and rule that compensation had been fixed for carrying the mails over roads other than that of the appellant, including that of the appellant, and in this case the Court of Claims at that time determined and adjudged that the said sections of the Revised Statutes were applicable to the Union Pacific Railroad Company, as well as to the other railroads of the country, and rendered a judgment accordingly (see 16 Court of Claims, p. 569).

VII.

That on appeal to this honorable Court, the said judgment of the Court of Claims was reversed, as will more fully appear by reference to the opinion and judgment of this honorable Court, upon the ground, among others, that the said provisions of the statutes were not applicable to the appellant (Union Pacific Railroad vs. The United States, 104 U. S., 662).

That in the decision of said case this Honorable Court, among other things, held:

That in determining what was a fair and reasonable compensation " a court or jury would be authorized to look over the entire field of service for a kind of service which was similar to, but not identical with, any other. For instance, if it should appear that the receipts of passenger cars were less than the receipts of postal cars and the cost and running expenses no greater, we are inclined to think that that fact might be deemed a proper element in the problem of estimating the amount of fair and reasonable rates of compensation," and that what is a fair and reasonable compensation "must be determined upon a consideration of all facts material to the issue, not to exceed the amounts paid by private parties for the same kind of service." Upon such reversal the cause was "remanded to the Court of Claims with instructions to proceed in conformity with the opinion of the Supreme Court."

106 U. S., p. 668.

And your petitioner further represents that pursuant to the said opinion and judgment of this honorable Court, testimony was taken by both parties to be used on the second trial of said cause, in relation to the various kinds of railway service, the method of performing the same, the character of the appellant's road and of the country traversed by it, the expenses to appellant of performing such service, the character and extent of express, passenger and freight service conducted in the same trains in which the said mail was transported, and as to the allowances to appellant by connecting roads, and other matters connected with and incident to the operations of the said road and the performance of the said mail service and the value thereof, as more fully hereinafter stated.

VIII.

That on the second trial of said cause in the Court of Claims (from the judgment and decree which resulted therefrom this appeal has been taken) appellant, having submitted to the Court testimony bearing upon what was fair and reasonable compensation not exceeding what was paid by private parties for the same kind of service and to which reference will hereafter be more specifically made, submitted to the Court, pursuant to its rules in that behalf, certain requests for findings of fact, in relation to the question as to what was a fair and reasonable compensation for carrying the mails, which said requests relating to the subject are in the words and figures following, to wit (requests relating to other subjects in controversy are here omitted):

" UNITED STATES COURT OF CLAIMS."

THE UNION PACIFIC RAILROAD COMPANY
vs.
THE UNITED STATES.
No. 11,901.

THE UNION PACIFIC RAILROAD COMPANY
vs.
THE UNITED STATES.
No. 12,515.

THE UNION PACIFIC RAILWAY COMPANY
vs.
THE UNITED STATES.
No. 14,389.

CLAIMANT'S REQUEST FOR FINDINGS.

The claimant, considering the facts hereinafter stated and set forth to be proven, and deeming them to be material to a due presentation of this case in the findings of fact, requests the Court to find the same as follows:

MAIL TRANSPORTATION.

4. The Weight of the Mails carried between February 1, 1876, and December 31, 1882, was as follows:

PERIOD.	No. of Days.	Weights reported by Department. Slater, p. 603. *Pounds.*	Reduced to actual on Dep't's basis. *Pounds.*	Revised Approximate average. *Pounds.*
Feb. 1, 1876, to March 31, 1878	790	15,348	13,161	A—14,885
April 1, 1878, to Jan. 31, 1880	671	19,369	16,609	A—18,952
Feb. 1, 1880, to March 31, 1882	790	24,833	21,295	A—23,367
April 1, 1882, to Dec. 31, 1882	275	29,665	25,439	B—27,855

AAA. One-half of the increase added to the "Reduced" Weights, as per Slater's evidence (Record, p. 604).

B. 2416 pounds per day added, based on the percentage of increase from 1880 to 1882, viz., 19 per cent. in about *two* years.

14,885 lbs	790 days	11,759,150 lbs.
18,952 lbs	671 days	12,716,792 lbs.
23,367 lbs	790 days	18,459,930 lbs.
27,855 lbs	275 days	7,660,125 lbs.
	2526 days	50,595,997 lbs.

Average per day, both ways	20,030 lbs.
Average per day, one way	10,015 lbs.

5. For the transportation of the mails, upon the requisition of the defendants, the claimant furnished postal cars, specially fitted up and exclusively used for postal purposes, of the dimensions and weights following:

	Length inside dimensions.	Weight. Pounds.
From 1876 to 1878	46 ft. 8 in.	46,992
" Jan. 1, 1879	51 ft. 9 in.	53,832
" Jan. 1, 1880	53 ft. 6 in.	56,685
" Jan. 1, 1881	60 ft.	64,525
" Jan. 1, 1882	58 ft. 7 in.	63,770

These cars were hauled in the claimant's express passenger trains, in which train was also hauled the express cars devoted to the transportation of express freight.

6. During the years 1876, 1877, 1878, 1879, 1880, and 1881 at least one mail car started each day from Council Bluffs and one from Ogden. During the year 1882 two mails cars started each day from Council Bluffs, one running through to Ogden and the other

going only as far as Denver Junction. One car started from Ogden, going through to Council Bluffs, and another, starting at Denver Junction, going to Council Bluffs, the two cars each way being on separate trains. These trains contained also baggage, passenger, express, Pullman, first-class and second-class coaches, emigrant and special cars and dinkeys.

In addition to the exclusive use of the said postal cars for transporting the mails the claimant also used each day the baggage car and the express car, and sometimes a special car in addition, for carrying such portion of the mail as could not be carried in the postal car. An extra car was hauled twice a month going westward, and once a month going eastward, loaded with Australian mail, which was not handled in transit over the road of claimant, but was handled at terminal points; the car in which it was transported was 29 feet 1 inch in length, weighing 27,929 lbs. These cars were not heated, lighted, or specially fitted up for mail purposes, and were not accompanied by any messenger traveling in the said car.

Said Australian mail was a part of the entire mail transported, and enters into the average daily weight named in the finding above.

The said postal cars are built and fitted up by the company upon plans prescribed by the Post-Office Department, and are furnished complete at the company's expense. Light, fuel, water, ice, &c., are also furnished by the company as required. These cars are used by the company, and are fitted up with all facilities for handling and distributing the mail, as required by the Postmaster-General, and also with sleeping accommodations for postal employees.

The mail is received from and is delivered to all post offices on the route by the railroad company when the post offices are within eighty rods of the railroad. The mail is also handled by station employees when it is received from and delivered to connecting lines, and this company pays its proportionate expense of the same. From one to five post-office employees travel on each postal car, who handle, distribute, and sort the mail on board the car. The Postmaster-General, in his discretion, imposes a fine upon the company for any delay or non-delivery of the mails.

Finding above, Record, pp. 2, 3, 9, 10, 22.

The amount of mail carried daily in cars other than the postal car and that carrying the Australian mail was from two to five tons.

Record, pp. 260, 267, 268, 281, 282, 312.

The claimant company receives at Council Bluffs the mail that arrives each morning and evening from six eastern connecting roads. It requires some time to assort the mails and distribute that which must necessarily go into the postal car from that which may go into other cars. If claimant company should delay the making up of its train to await the arrival of all of said eastern trains, before claimant should commence the work of transferring the mails and delivering them to the postal employees of the defendant, it would lose not only the time it was waiting on trains that may be delayed, but also from two or three hours doing the work necessarily to be done after such trains arrive. It is, therefore, reasonably necessary to commence (and such is the practice of the company, with the concurrence and at the request of the postal agents) receiving and transferring the mail matter immediately on the arrival of the first train from the east, and so on as successive trains arrive, in order to expediate the work and get off claimant's trains on time.

The postal employees of the United States place what they call the working mail, which consists of matter which requires to be handled, assorted, and distributed between Council Bluffs and Ogden, and the reverse, into the postal car, to be worked, and the major part of the mail outside of that is put into express and baggage cars, and in addition an extra car is sent about three times a week in summer and about four or five times a week in winter. This is rendered necessary by the amount of mail matter. The weight of the mail thus carried daily outside of the postal car averages from two to five tons.

Page 268.

This is in addition to what is called the Australian mail. Whenever necessary to enable the Australian mail to make connection with the steamer at San Francisco, the company puts on a special fast train.

Pages 108 to 110.

In performing the postal service the company always expedites the mail and gives it preferential service. When trains are snowed up or delayed by wash-outs or otherwise, the company makes it a special point to get the mail trains through on time, as nearly as possible, to which end they delay and put aside their other business at considerable expense, and at times and whenever necessary have cut off the first-class passenger car to enable the mail to get through.

Pages 108, 111.

The company's employees attend at all intermediate post-office stations to receive and deliver the mail.

7. The express cars, carried in the same train in which the said postal cars were carried, were of the length and weight following :

From 1876 to 1880, 43 feet 1 inch ; weight, 48,085 pounds.

For 1881 and 1882, 43 feet 11 inches ; weight 48,522 pounds.

These cars, containing the ordinary and regular express matter, are furnished with a safe, and are fitted with sleeping and other accommodations for one messenger. The railroad company does its own express business. It collects and delivers express matter without extra charge, and is responsible for any loss or damage. One express messenger accompanies each car, unless on special business an additional messenger is detailed. The company maintains a special organization for conducting its express business, having express offices in all the larger towns ; but generally the regular agent of the company attends to its express business.

Stipulation, 12.

8. In 1869, on the completion of its road, the claimant company resolved, on the motion of a Government director, to do its own express business (Record, p. 724) ; and during that part of the period covered by this case to November, A. D. 1879, the Union Pacific Company conducted the express business over its road for itself and in its own name ; and during the period from the said 1st of November, 1879, to the 31st day of December, 1882, the express business on said road was conducted by and for it in the name of the Pacific Ex-

press Company—an organization without stock, composed of several railroad companies, including the claimant—for the purpose of doing and conducting on their respective roads an express business, and respectively deriving the gains, earnings and profits thereof; the said Pacific Express Company being a vehicle for carrying on the said business, and enjoying none of the gains, earnings or profits thereof.

Morseman, p. 80; *Ib.*, pp. 746, 747, Qs. 136-140, and answers.

The contract between the claimant and the Pacific Express Company provides that the railway companies, parties thereto, including the claimant, employ and appoint the Pacific Express Company as their agent to conduct, carry on and have full control of all business carried or transported on their passenger trains; and that the said Pacific Express Company shall pay over to the said railroad companies the entire earnings of the Pacific Express Company from whatever source received, after deducting all necessary expenditures for operating expenses, payment of losses or damages incurred, and purchase of material; and that said express company shall keep, as near as is practicable, the earnings of each of the railway systems separate, in order to show the actual gross earnings of each system, and that the net earnings of the entire business shall be divided among the said railway companies *pro rata* in the same proportion that it is shown their gross earnings bear to each other; and that the express company shall have the right to use the depots of said railway companies for offices without rent, and to the use of the station agents or trainmen as agents or messengers of said express company whenever it so desires, if it can be done without detriment to the general business of the railway companies, without paying for such service.

Record, p. 668.

From February 1st, 1876, to the 31st of October, 1879, the gross earnings of the Union Pacific Company from its express business were, per month, daily and per pound, and the average daily weight carried was as set forth in the following table:

TABLE "EXHIBIT B" (Record, p. 342).

Statement of express earnings of main line of Union Pacific Railway Company, Council Bluffs to Ogden, Utah, excluding extra cars of fruit, fish, &c., and daily average of weight transported, way reduced to through and average earnings per pound.

	Earnings per month.	Average daily earnings.	Daily Average weight.	Earned per pound.
1876.			*Pounds.*	*Cents.*
February	$28,036 00	$966 50	10,392	9.30
March	37,910 00	1,223 00	10,768	11.36
April	38,000 00	1,266 10	10,970	11.54
May	41,000 00	1,322 00	11,355	11.65
June	47,260 00	1,575 00	14,318	11.00
July	35,425 00	1,143 00	10,612	10.77
August	47,589 00	1,535 00	14,370	10.07
September	41,242 00	1,374 00	13,398	10.26
October	39,994 00	1,290 00	11,993	10.01
November	42,190 00	1,406 00	13,357	10.53
December	37,953 00	1,224 00	12,044	10.01
1877.				
January	26,820 00	865 00	7,761	11.14
February	23,719 00	847 00	8,177	10.35
March	32,242 00	1,040 00	8,141	12.76
April	30,688 00	1,022 00	9,484	10.77
May	29,924 00	965 00	7,208	13.38
June	31,554 00	1,052 00	7,768	13.54
July	29,285 00	944 00	7,290	12.95
August	30,661 00	989 00	8,200	12.06
September	37,501 00	1,250 00	11,997	10.41
October	36,447 68	1,175 73	11,228	10.47
November	33,413 00	1,113 76	10,516	10.68
December	41,308 37	1,332 53	14,240	9.35
1878.				
January	39,449 36	1,272 56	9,010	14.12
February	33,401 92	1,192 87	9,629	12.39
March	36,186 61	1,167 31	10,064	11.59
April	34,751 40	1,158 38	8,820	13.13
May	39,537 71	1,275 41	8,494	15.01
June	28,208 40	940 28	6,419	14.65
July	28,425 76	916 96	7,375	12.43
August	30,606 92	987 32	8,605	11.47
September	32,406 90	1,080 23	10,334	10.45
October	40,749 50	1,314 50	12,135	10.83
November	39,653 28	1,321 77	13,400	9.86
December	42,125 92	1,357 29	16,876	8.04
1879.				
January	31,386 09	1,012 45	8,249	12.27
February	24,894 80	889 10	9,181	9.67
March	29,312 87	945 57	8,700	10.87
April	29,521 96	984 06	9,199	10.70
May	29,347 52	946 70	8,700	10.88
June	27,850 70	928 35	8,819	10.52
July	33,111 66	1,068 12	8,861	12.05
August	42,338 80	1,365 77	11,477	11.90
September	33,228 37	1,107 61	10,653	10.40
October	36,062 64	1,163 31	11,921	9.98

From the 1st day of November, 1879, to the 31st day of December, 1882, the receipts of the claimant from the express business over its road between Council Bluffs and Ogden, after deducting all expenses, were as follows:

"EXHIBIT C" (Record, p. 325).

Statement of payments made to Union Pacific Railway by the Pacific Express Company for service on main line, Council Bluffs to Ogden.

Month.	Number of extra cars.	Earnings on extra cars.	Total payments.
1879.			
November	6	$2,403 04	
December			
1880.			
January			
February *			
March			
April	1	448 77	
May			
June			
July	6	2,436 84	$274,936 53
August	15	6,237 76	38,189 10
September	5	2,121 03	43,114 30
October	24	10,088 64	51,850 53
November	22	8,968 03	53,911 97
December	......	......	55,871 00
1881.			
January	......	......	31,542 62
February	......	......	25,823 32
March	1	448 77	30,187 01
April	1	546 48	34,261 92
May	1	459 06	39,392 42
June	11	4,560 50	40,201 72
July	36	14,644 98	39,769 88
August	25	10,285 41	43,703 59
September	20	8,345 44	48,438 73
October	27	11,149 23	52,381 28
November	3	1,253 65	58,427 78
December	......	......	65,338 11
1882.			
January	......	......	34,866 83
February	......	......	21,835 74
March	......	......	29,896 60
April	2	787 93	35,764 77
May	......	......	39,732 51
June	2	1,226 46	47,430 86
July	33	14,604 28	54,006 29
August	52	23,164 42	58,449 21
September	30	12,002 07	61,942 91
October	31	12,523 74	57,355 44
November	4	1,621 04	50,497 00
December	......	......	55,874 00

*One payment made.

The net earnings received by the claimant from express proper, deducting earnings from extra cars carrying fruit and fish, was the sum of $1,468,733.09 during the last-named period.

The average rate per pound for the said express matter thus transported was nine or ten cents during said last period. (Record, p. 313.)

The earnings in the second column of said "Exhibit C," headed "Earnings on Extra Cars," relate to the cars which carried fish and fruit. Fish and fruit as a rule were transported on freight trains as a cheap and low grade of freight, and not as first class freight; first-class freight rates on freight trains on said road being 3.05 cents per pound, while the rate for carrying fruit and fish on freight trains was 1⅛ cents per pound. At times during certain seasons of the year fish and fruit were transported in passenger trains, and for the purposes of expedition and the convenience of the public were placed under the management of the express department. It was carried in the dinkey cars herein described, which were received at Ogden, filled and transported without handling or special attention in transit to Council Bluffs, where the same cars were delivered to connecting roads. (See references in brief under heading of FISH AND FRUIT CARD.)

In order to get this business, said fish and fruit had to be carried at low rates, viz., 2¼ cents per pound. Fish and fruit are not matter such as is usually carried as express matter, but is low grade freight matter. The earnings set forth in said second column are the earnings derived from the transportation of fish and fruit in extra dinkey cars in passenger trains in the manner and for the reasons above stated; the said rate, viz., 2¼ cents per pound, being double the rate on such matter when transported on freight trains on the claimant's road. (See references last above.)

9. That in earning the above amount of express earnings there was used between February 1st, 1876, and 31st of December, 1882—a period of 2,526 days—one express car each way between Council Bluffs and Ogden, per day, on passenger trains three and four; and during said period three extra express cars, one trip each were used—making the aggregate number of express cars used during said period 5,058 on trains three and four; and during the same period there were used

in the same trains in which the express car was carried, one postal car each way each day and 44 extra postal cars west-bound and 24 extra postal cars east-bound, making the aggregate 2,570 postal cars west-bound and 2,550 postal cars east bound—aggregating during said period 5,120 cars. (Record, p. 497.)

That during the calendar year 1882, or passenger trains one and two (running between Council Bluffs and Denver Junction), the mail was carried over claimant's road to Denver Junction on claimant's road, in one postal car each day west-bound, and on one trip an extra car was used; and east-bound one car each day, for 364 days; and in the same train, between the same points, there was one west-bound car devoted to baggage and express, and the same number each day east-bound. (Record, p. 506.)

10. That the express business is made up principally of the transportation of dry goods, silks, money (paper and coin), and other valuables, books, papers and pamphlets, and light articles and packages; and embraced in the articles usually transported by express are certain classes of articles which, when transported as freight by railroad companies, are charged for as first-class freight, such as books, pamphlets and small packages. The United States mail carries up to the limit of four pounds weight all the articles usually carried by express, and makes a direct competition between the mail and the express; and the two kinds of services are substantially identical in cost, character and incidents.

Morseman, Record, p. 72.
Blanchard, Record, p. 115.
Fink, Record, pp. 127, 128.

The earnings of the Pacific Express Company from November 1st, 1879, to December 31st, 1882, was $7,153,000; the losses during the said period were $25,000 to $30,000 (p. 737), making the percentage of loss less than one-half of one per cent. of the earnings.

11. The Post-office Department has allowed the Union Pacific Company for postal services rendered on the route between Council Bluffs, Iowa, and Ogden, Utah, the following sums (see Record, p. 658):

February 1, 1876, to February 13, 1876	$11,614 46
February 14, 1876, to March 31, 1876	49,189 26

April 1, 1876, to June 30, 1876	$95,497 20
July 1, 1876, to June 30, 1878	695,861 44
July 1, 1878, to October 19, 1879	490,538 41
October 20, 1879, to June 30, 1880	270,420 34
July 1, 1880, to January 1, 1882	672 347 41
January 2, 1882, to June 30, 1882	226,872 30
July 1, 1882, to December 31, 1882	255,103 40
	$2,767,444 22

Revising the average weights carried to conform to the methods of the Post-office Department, and allowing for the natural increase in the weights between the various weighings, the allowances of the Department are equal, for the whole period, to 5.469 cents per pound.

On the readjustment of pay for 1876, based on 14,885 lbs. per day, the compensation averaged	6.40	cents	per lb.
On the readjustment of pay for 1878, based on 18,952 lbs. per day, the compensation averaged	5.44	do	do
On the readjustment of pay for 1880, based on 23,367 lbs. per day, the compensation averaged	5.24	do	do
On the readjustment of pay for 1882, based on 27,855 lbs. per day, the compensation averaged	5.02	do	do

12. *The Gross Express Earnings per pound, February 1st, 1876, to December 31st 1882, excluding extra cars i. e., cars carrying fish and fruit, were as follows:*

Pounds carried February, 1876, to October, 1879, inclusive (Record, p. 324)	14,040,551
Pounds carried November, 1879, to December, 1882, inclusive, ascertained on the basis of 9 cents per pound (Record, p. 313)	22,347,271
Pounds	36,387,822

Gross express earnings, February, 1876, to October, 1879, inclusive (Record, p. 324)		$1,562,721 04
Gross express earnings, November, 1879, to December, 1882, inclusive (Record, p. 692)	$2,161,600 00	
Less earnings of extra cars (Record, p. 325)	150,345 57	
		2,011,254 43
		$3,573,975 47

Average gross express earnings per pound, excluding extra cars	9.8219 cents.
Amount that would be due the company for mail compensation if the above-ascertained rate was to be applied	$4,969,488 22

The operating expenses of the express department from February 1, 1876, to November 1, 1879, were 20 per cent. of its gross earnings. (Report of U. S. Commissioner of Railroads of 1878, p. 30.) The operating expenses of the Pacific Express Company for the year 1880 were 23.833 per cent.; for 1881, 26.902 per cent.; for 1882, 29.884 per cent. of its gross earnings, being an average of 23.918 per cent.

The services rendered on the claimant's road to the United States, in addition to the transportation of the mail in the postal car, consists in caring for, handling, and receiving the mails at terminal stations, and in also caring for, handling, receiving and delivering the mails at the numerous intermediate stations on its route, and delivering the same to the post-offices, where the post-offices are within 80 rods of the railroad station, and in giving preferential attention in cases of detention by snow or otherwise to the postal service, and when necessary running special trains and in carrying more postal messengers than express messengers, and in greater weight and expense of postal over express cars, the value of which equals the aforesaid expenses of the express department.

The only service rendered on the passenger trains of the claimant's road are the following:

First. Mail service.

Second. Express service as hereinbefore described.

Third. Passenger service.

And the Court finds that the mail service is, in its character and incidents, substantially like the express service, and that as said two services are rendered and performed on the claimant's road, the claimant is reasonably and fairly entitled to receive for each pound of mail carried the same rate per pound that its express department receives from the public per pound for carrying express matter in the express car.

13. *The net express earnings per pound, February 1st, 1876, to December 31st, 1882, excluding extra cars, i. e., fish and fruit cars, were as follows:*

Pounds carried, as per finding 12		36,387,822
Gross earninsg, excluding fruit and fish cars, February, 1876, to October, 1879.	$1,562,721 04	
Estimated expenses, 20 per cent. (Report Commissioner of Railroads, 1879, p. 30)	312,544 21	$1,250,176 83
Gross earnings, November, 1879, to December, 1880	681,400 00	
Less extra cars, *i. e.*, fish and fruit (Record, p. 325)	32,704 11	
	$648,695 89	
Expenses, 23.833 per cent. (p. 691)	154,603 69	494,092 20
Gross earnings, year of 1881	$697,900 00	
Less extra cars (*i. e.*, fish and fruit cars)	51,711 52	
	$646,188 48	
Expenses, 26.902 per cent. (p. 691)	173,837 62	472,350 86
Gross earnings, year of 1882	$782,300 00	
Less extra cars (*i. e.*, fish and fruit cars)	65,929 94	
	$716,370 06	
Expenses, 29.884 per cent. (p. 691)	214,080 03	502,290 03
Total net express earnings		$2,718,909 92
Average net express earnings per pound, excluding extra cars		7,472 cents
Amount that would be due the company for mail compensation if the above ascertained rate was to be applied		$3,780,532 89

14. *The Average Gross Earnings per pound of express matter and of extra cars (fish and fruit) from February 1, 1876, to December 31, 1882, were as follows:*

Gross Earnings, excluding extra cars, Feb. 1, 1876, to Oct. 31, 1879 (p. 324)		$1,562,721 04
Gross Earnings, express, including extra cars, Nov., 1879, to Dec. 1880 (p. 692).	$681,400 00	
Less extra cars entered herein as a special item	32,704 11	648,695 89

Gross Earnings, express, including extra cars, year of 1881 (p. 692)................	$697,900 00	
Less extra cars entered herein as a special item..............................	51,711 52	
		$646,188 48
Gross Earnings, express, including extra cars, year of 1882 (p. 592)..................	$782,300 00	
Less extra cars entered herein as a special item..............................	65,929 94	
		716,370 06
Gross earnings, extra cars, Feb. to Dec. 1876, 82 @ $450 (p. 17)..		36,900 00
Gross earnings, extra cars, year of 1877, 51 @ $450...		22,950 00
do do year of 1878, 113 @ $450...		50,850 00
do do Nov. & Dec., '79, 6 (p. 325)		2,403 04
do do year of 1880, 73 (p. 325)....		30,301 07
do do year of 1881, 125 (p. 325)...		51,711 52
do do year of 1882, 155 (p. 325)...		65,929 94
ADD estimated number of extra cars, January to October, 1879, based on transportation of such cars in 1877, viz., 51 cars; 1878, 113 cars; and 1880, 73 cars; in all, 237 cars, or average per year, 79 cars: 79 cars for 1879, less 6 cars already reported, leaves 73 cars @ $450 each...		32,850 00
Gross express and extra car earnings...............		$3,867,871 04
Weight of ordinary express matter, February, 1876, to October, 1879 (p. 324)..	14,040,551 lbs.	
Weight of ordinary express matter, November, 1879, to December, 1882 @ 9 cts.	22,347,271 lbs.	
Weight in 678 extra cars, estimated at 20,000 lbs. each..............................	13,560,000 lbs.	
		49,946,822 lbs.
Average gross earnings per pound, express matter and extra cars..		77,438 cts.
Amount that would be due the company for mail compensation if the above ascertained rate was to be applied..		$3,918,052 81

15. *The Average Net Earnings per pound of express matter and of extra cars (fish and fruit) from February 1, 1885, to December 31, 1872, were as follows:*

Gross earnings, not including extra cars, February 1, 1876, to October 31, 1879..........	$1,562,721 04	
Gross earnings, extra cars, February to December, 1876...........	36,900 00	
Gross earnings, extra cars, year of 1877..	22,950 00	
Gross earnings, extra cars, year of 1878.....	50,850 00	
Gross earnings, extra cars, January to October, 1879, estimated..........	32,850 00	
	$1,706,271 04	
Estimated operating expenses, 20 p. c.	341,254 21	
		$1,365,016 83

Gross earnings, including extra cars, November, 1879, to December, 1880.	$681,400 00	
Operating expenses, 23.833 p. c.	162,398 06	
		$519,001 94
Gross earnings, including extra cars, year of 1881	697,900 00	
Operating expenses, 26.902 p. c.	187,749 06	
		510,150 94
Gross earnings, including extra cars, year of 1882	782,300 00	
Operating expenses, 29.884 p. c.	233,682 53	
		548,617 47
NET express and extra car earnings...		$2,942,787 18
Weight of express matter and contents of extra cars, as per preceding finding		49,947,822 lbs.
Average NET earnings per pound, express matter and extra cars		5.8917 cents.
Amount that would be due the company for mail compensation if the above ascertained rate should govern		$2,980,964 36
The above is the amount after allowing for all express expenses. To net the company as much, the Government should pay an amount in addition to cover the expenses incurred by the company in handling the mail at stations. The express and extra-car matter handled amounts in weight to nearly the same as the mail.* Estimating		
Brought forward		$2,980,964 36
the mail expenses at ONE-HALF of the express expenses ($925,083.86), we have (an average of $183.11 per day; or, for 57 stations, $3.21 each per day; or, for 1035 miles, 18 cents per mile per day).		462,541 93
The mail would then pay an average of 6.805 cents per pound, or		$3,443,506 29

16. That, in view of the unusual cost of the construction, maintenance and operation of the claimant's road, and the sparseness of population of the country through which it runs, and the limited tonnage and amount of local business which such country furnished, as compared with the amount furnished to connecting roads east of the Missouri River, by the regions through which they run, said connecting roads, in the interchange and division of business—passenger, freight and express—with the claimant company, have continuously, during the period covered by this

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* Mail Matter, 50,595,997 pounds; Express and Extra-car Matter, 49,947,822 pounds.

suit, and prior thereto, conceded and agreed to give, and have given and allowed, the claimant company fifty per cent. per mile in excess of what such connecting roads receive per mile; that is to say, the Union Pacific Road, on an actual mileage of 1,035 miles, is rated as being 1,552 miles; and for each mile of its road the claimant is allowed by such connecting roads one and one-half miles for every actual mile hauled. The compensation allowed to the Union Pacific by the defendant for carrying the mails during the period in controversy in this suit, fixed under the Revised Statutes, sections 4001, 4002 and 4004, and amendments thereto, is the same, and no greater, than is and has been allowed by the defendant for carrying the mails during said period to such connecting roads.

Shelby's Evidence, Record, pp. 278, 279.
Kimball's Evidence, Record, p. 282.
Morseman's Evidence, Record, p. 81.

The Post-Office Department has allowed for the period from February 1st, 1876, to December 31st, 1882	$2,767,444 22
Fifty per cent. added	1,383,722 11
Which, if paid for postal service, would yield to the Union Pacific Company	$4,151,165 33

An allowance of this amount would be equal to 8.204 cents per pound.

The Union Pacific Road from Council Bluffs to Ogden is 1,035 miles long; Cheyenne is distant from Omaha 516 miles (p. 85). From Omaha to Cheyenne the grades on the road are not difficult. For 250 miles west of Omaha the road runs through an agricultural country, in which there is, in the counties in Nebraska, a population of about 215 to the mile. From that point to Cheyenne the country is sparsely populated, being devoted to stock raising. By the census of 1880 the population in the counties along the whole line of the Union Pacific Road is 142 per mile; on the Missouri Pacific, in Missouri, it is 2,310 per lineal mile; along the Chicago, Burlington and Quincy Railroad, in Iowa, 804 to the mile, and in Illinois 3,383 to the mile; along the Pittsburgh, Fort Wayne and Chicago

Railroad, in Ohio, 3,269 to the mile, and along the New York Central 5,816 to the mile in New York (p. 84). The ties and timber supply east of Cheyenne for the road has to be obtained from other States, and west of Cheyenne has to be obtained from a distance of fifty to several hundred miles (p. 85).

From a point about 250 miles west of Omaha the road runs through an alkali region (p. 183), where a good deal of the water for steam purposes had to be distributed by water trains. More recently water has been obtained by means of wells of the character mentioned in Exhibit D, hereinafter mentioned, and the water supply is still very expensive. These wells—18 or more in number—are artesian wells, from 300 feet to 2,300 feet deep, costing from $300 to $20,000 (p. 86). The water tanks to receive the water are frost-proof, costing each from $3,000 to $4,000. The fuel is more expensive than on Eastern roads, having to be distributed over the road in coal cars or special trains for several hundred miles (pp. 53, 87, 183). West of Cheyenne the country is mountainous and sparsely populated (p. 75). The grades and curves make this portion of the road an expensive one to operate, the grades being from 60 to 90 feet to the mile at frequent intervals, thus controlling the load that an engine can haul, and in many places it is necessary to use two locomotives, thus increasing the operating expenses of the road (p. 184). The wages of employees are 50 per cent. higher than on the Eastern connecting roads (pp. 185, 191, 208). The cost of performing transportation service is one of the elements for fixing and determining the compensation to be received by a railroad for such service (Fink, p. 126).

The fact that the Union Pacific runs through a sterile and mountainous region, with comparatiuely little local business, at such increased expense, is an element to be taken into the account in fixing a reasonable compensation for service by it. (p. 121).

Space, speed, postal clerks carried, cost of lighting, fitting up car, proportion of weight charged for to weight transported, the fact that the train must make many stops for the delivery and receipt of mails, are also elements to be taken into the account in ascertaining a reasonable compensation for carrying the mail (pp. 114, 115).

Extra Baggage.

17. In the baggage car on the passenger train the claimant allows each holder of a first-class ticket to carry, without further compensation, 100 pounds of baggage. On all baggage in excess of 100 pounds the claimant has for the last 14 years charged, and the public has paid, at the rate of $8\frac{1}{10}$ cents per pound (R., p. 308). It is reasonably and fairly worth as much to carry one pound of mail matter in the manner in which the service is performed by the claimant as it is to carry a pound of extra baggage ; and applying this rate per pound to the weight of the mail carried during the period in suit, the claimant would be entitled to receive from the United States the sum of $4,098,275.76.

[Here follow requests relating to other subjects.]

30. The following letter or notice was sent by the president of the Union Pacific Railroad Company to the Postmaster-General on the day it bears date, and there is no controversy as to the receipt of it by the latter in due course of mail. Said letter is as follows :

Union Pacific Railroad Company.
President's Office, 23 Nassau St.

P. O. Box 5446 Sidney Dillon, President.
New York, Sept. 1, 1876.

Hon. J. N. Tyner, Postmaster-General :

Sir :—By a recent weighing of the mails transported by the company for your Department, made in February last, the average daily weight for a period of thirty consecutive days was fifteen thousand pounds.

Under contract of the Government (see section 6 of the Act of 1862), we are required to perform this service at rates of compensation not to exceed the amount to be paid by private parties for the same kind of service.

The transportation of express matter is performed on the same trains, viz., passenger trains, and is assumed to be the same kind of service.

We have accordingly had a careful computation made of the compensation received for express service, and computing the mail service on the basis indicated, gives the annual sum of $596,775 or $49,731.25 per month.

Dating from February 1st, 1876, we shall charge the Government this sum monthly for mail transportation, in addition to the fares of such employees and mail agents as the Government shall send on our trains.

The company believe the Postmaster-General will concede the correctness of the rule we have adopted as to similar kinds of service, inasmuch as the large increase of mail transportation—the increase having been from 6,000 pounds in 1870 to 10,500 pounds in 1874, and to 15,000 pounds in 1876—is drawn largely from the transportation of gold coin and other express matter, which was formerly done by the express department of the company, and is now largely sent by mail in sealed packages. The weight, as ascertained at the last weighing, will be assumed as the daily amount transported, until the Government or the railroad company request a re-weighing. We assume this is very fair toward the Government, inasmuch as the mail matter is constantly increasing, as the figures we have alluded to show. The compensation we now propose to charge is less than that allowed us from 1870 to 1874.

Very respectfully,
SIDNEY DILLON, Pres't.

Pursuant to said letter the claimant has insisted upon its right to be paid in accordance therewith; but the Postmaster-General continued to fix the rates to be paid to the company under sections 4001, 4002 and 4004 of the Revised Statutes and amendments thereto; and pursuant thereto, and against the protest of the company as to its sufficiency, allowances have been made to the company as follows: (Record, page 658.)

From February 1, 1876, to December 31, 1876	$330,266 28
For the calendar year of 1876	347,930 72
For the period from January 1 to June 30, 1878	173,965 36
For the period from July 1 to December 31, 1878	188,432 28
For the calendar year of 1879	378,918 19
" " " " " 1880	417,309 82

For the calendar year of 1881.........	$447,403 08
“ “ “ “ “ 1882.........	483,218 49
	$2,767,444 22

The payment of said sums from July 1st, 1878, to December 31st, 1882, has been made by retaining and applying the same by the defendant to the credit of the company as provided by the act approved May 7th, 1878.

And the payment of said sums prior to July 1st, 1878, was made by retaining and applying the same to the bond and interest account of said claimant.

31. That the rates of compensation for carrying the said mails specified in said letter were fixed by the company, and notified to the defendant; the said rates were reasonable and fair, and they did not exceed the amounts paid by private parties for the same kind of service, and they did not exceed the rates determined and fixed by the company in its course of dealings with the public.

32. The mails embraced in the accounts sued on by the claimant were all of them carried on the passenger trains of the claimant company in a postal or other car, as specified in finding No. 6.

The said passenger trains were usually constituted as follows:

One locomotive on the non-mountainous portion of the claimant's road, and two locomotives or a large locomotive of unusual capacity, on the mountainous portion; one baggage car of the ordinary size and weight; one postal car weighing from 45,400 pounds to 65,200 pounds (p. 508); one express car weighing from 46,000 to 54,000 pounds (p. 508); one first-class passenger coach of the usual seating capacity; one second-class coach, used as a smoking car, and two Pullman cars of the usual and ordinary size and character of such cars, weighing from 64,000 pounds to 74,000 pounds (p. 509).

That the average weight of mail carried each way per day was 10,015 pounds during the period covered by this suit, and the average weight of the postal cars each way per day during said period was 57,945 pounds. The average weight of express matter carried in the express cars each way per day was 7,203 pounds, and the average weight of the express cars was 49,852 pounds, and the average rate per pound received by the claimant on express business proper was 9.8219 cents per pound.

Second-class passengers, that is, passengers who paid less than first-class rates, rode in the smoker, and were not allowed in the first-class car or sleepers (p. 88); such passengers did not pay for and were not entitled to the speed made and the accommodations afforded by the first-class passenger trains (p. 57); but in consequence of the second-class passenger business upon the claimant's road being so limited and small that it would not pay to run a special train for that business, the company, for its convenience and to save expense, hitched the second-class car upon the first-class passenger train, instead of putting it upon a slower train (pp. 57, 88).

The said Pullman cars were run under a contract between the railroad company and the Pullman Company; the latter company furnishing the cars and the railroad company keeping the same in repair and supplying them with materials for lights, and washing and cleansing them, and carrying free the general officers of the Pullman Co.; and the Pullman Company furishing and keeping in order the carpets and bedding, and one or more employees were carried by the railroad company on each train without charge to the Pullman Company; the only receipts therefrom received by the railroad company were the first-class passenger fares; the Pullman Company receiving the proceeds of the sales of berths (pp. 45, 46, 5 28). In sleeping cars, custom gives the passenger very much more room, and at night double the room of day passengers, for a slight additional compensation (p. 540). In a transcontinental passage, in a day car, the practical effect of the requirements of the public is that no more than half of the full capacity of the car is available; the through passenger being willing to share his seat with the day passenger, the effect in general by averaging both local and through passengers might be that during seasons of active travel two-thirds of the capacity of the car might be occupied (p. 340).

The number of passengers of all kinds carried on the Union Pacific in its regular passenger trains during the period in question averaged nineteen persons per car, including all the passenger cars in the train.

No. —. The testimony shows that throughout the world, in the transportation of passengers by rail or vessel, the passenger himself, with his baggage, forms a standard in and of itself, aside from considerations of weight other than baggage (p. 115).

That by reason of the fluctuating and uncertain cost of a passenger train in movement, that a passenger, particularly in passing across the continent, requires and occupies room that cannot be charged for; that the development of the country necessitates, for purposes of emigration, differential rates between first-class passengers, second-class passengers and emigrants, excursion rates, free passes, &c., and the special expenses incident to the passenger traffic, no proper standard of what is a fair and reasonable charge for the transportation of the mails can be derived from the transportation of persons. They are not the same kind of service, and are never charged for in relation to each other (pp. 114, 338, 339).

That the claimant is entitled to receive from the defendant for carrying the mails during the period in question in this suit the rates charged to and paid by private parties for the same kind of services, provided such rates are fair and reasonable; that the express service as performed by the claimant for the public, in the manner in which it was and has been performed on the claimant's road, in a separate car devoted to this use, like the separate car devoted to the postal service, is substantially the same in its nature and cost as the postal service rendered for the defendant; and upon the testimony the Court finds that the claimant is fairly and reasonably entitled to receive from the defendant for carrying the mails the same rate per pound that the public pays and claimant receives for carrying express matter.

Blanchard's Evidence, p. 357.
Morseman's Evidence, pp. 71, 72, 73.
Fink's Evidence, pp. 127, 128.

Which entitles the claimant to have and receive from the defendant for the transportation of the mails during the period covered by this suit, the sum of $2,202,044 in excess of what has been allowed and paid, as herein found, by the defendant, and on the basis of net earnings per pound, as hereinbefore found, claimant is entitled to have in excess of what has been allowed and paid by the defendant, as hereinbefore found, the sum of $1,013,088.67.

33. The company has in its car equipment a class of cars known as " dinkey " cars, of the average weight of 28,927 pounds, and of a carrying capacity of not less than ten tons, and of a carrying capacity sufficient to carry the said mails, which cars could be safely run in the passenger trains in which said mail was carried. The postal cars required by the Government, used in said trains, averaged per trip in weight 57,945 pounds, and had a carrying capacity of not less than fifteen tons. The average weight of the mail was, as hereinbefore found, 10,015 pounds each way, daily. The first-class freight rates on freight trains on said road during said period was 3.05 cents per pound, and for carrying over the said road during said period first-class freights in passenger trains was reasonably worth double the said first-class freight rates, namely, 6.10 cents per pound. It was reasonably worth said double first-class freight rates per pound to carry the mail matter. If the said mail matter had been carried on the dinkey cars at double first-class freight rates, to wit, 6.10 cents per pound, the company would receive daily each way $610.92, or an average per pound, car and load, of 1.61 cents per pound. The defendant requires the company to transport said mail matter in postal cars of the daily average weight of 57,945 pounds, said mail matter weighing 10,015 pounds, making the total weight of postal car and mail matter transported 67,960 pounds. For this last-named weight the company is fairly and reasonably entitled to receive the average rate per pound, car and load, which would have been earned and received by the company had the mail been transported as first-class freight in such dinkey car on a passenger train, to wit, 1-61 cents per pound.

Upon the basis of pay for actual weight of car and load transported, and treating the mail as first-class freight transported in a passenger train in a sealed or through car, the company would be fairly and reasonably entitled to the said rate of 1.61 cents per pound, of postal car and load, which for the period covered by this litigation would amount to the sum of $2,760,201.58 in excess of the allowances of the defendant.

34. During the period covered by this litigation, namely, 2,526 days, the average earnings of a passenger car per trip, rating the car as being filled to its full seating capacity of fifty-two passengers, would have been $1,798.68, and rating the car as being filled at two-thirds of its seating capacity, say thirty-five passengers, they would have been $1,210.65. The comfort and convenience of passengers on the claimant's road, and a proper consideration of the interests of the company, the Government and the public, required that the company should run sufficient passenger cars in its trains so as not to require them to be filled beyond one-half or two-thirds of their seating capacity.

Upon the basis of filling a car to two-thirds of its seating capacity, the aggregate earnings for one car each way daily during the said period would amount to $3,348,759.58 in excess of what has been allowed by the defendant, as hereinbefore found.

35. That during said period the claimant also carried the postal employees and mail agents of the United States on each of said trains, the regular fares for which amount to the sum of $605,978.44.

At two-thirds rates (p. 89), $403,985.62; at one-third rates (p. 315), $201,992.81; and a just and reasonable allowance to the claimant for the carrying of said postal employees and agents (104 U. S., p. 668), for the said period covered by this suit, in addition to the postal service, in the sum of $

John F. Dillon,
Shellabarger & Wilson,
Attorneys for Claimant."

IX.

Your petitioner further shows and states that in support of the said several findings evidence had been adduced and was before the Court at said trial which fully sustained the said several requests; that the facts so requested to be found were substantially and fully proved by said testimony; that there was before the Court no evidence contradicting in any material degree the facts as stated in the said request for findings of fact, and your petitioner is advised by counsel and believes it to be true, and, therefore avers, that each and all of said facts so requested to be found were fully sustained by the evidence adduced by the appellant on said trial, and there was no evidence adduced which disproved the same, so far as the same purports to state any facts in relation to the character, extent and value of the service performed, the trains and the character of the cars in which it was performed, the manner in which it was performed, and all other facts set forth as such in said requests.

X.

Your petitioner further represents and shows to the Court that in addition to the general request for findings hereinbefore referred to your petitioner made a special motion to the Court before judgment was rendered, and while the Court had the said cause under consideration, asking that the said Court of Claims would specially find in respect of the requests hereinbefore set forth.

XI.

Your petitioner further represents, upon information and belief, as will more fully appear by reference to the record in said cause, that the Court of Claims failed and refused to make any findings whatever in respect of the said several requests hereinbefore set forth; and in relation to the issue hereinbefore referred to made no findings whatever except the following, to wit:

"The amounts allowed and retained by the Treasury Department for transportation of mails as aforesaid, are a fair and reasonable compensation for the service, and not in excess of the rates paid by private parties for the same kind of service" (R., p. 23, paragraph 16).

Your petitioner states, on information and belief and the advice of counsel, that testimony was taken in said cause and submitted to the Court of Claims on the several different bases shown in said above-mentioned requests to find and in a memorandum hereto annexed as part hereof, marked "*Exhibit B*," and that the several bases of fact as shown and stated in said requests and memorandum were sustained and supported by the said evidence without substantial conflict or contradiction; and that no evidence was given or submitted to the said Court that the amount allowed and retained by the Treasury Department for the said mail service was a fair and reasonable compensation therefor, not in excess of rates paid by private parties for the same kind of service.

Your petitioner states that it was admitted in the brief filed by the United States in the Court of Claims that

> "claimant has abundantly established the fact that the Union Pacific has received from the public about fifty per cent. more per mile for freight and passengers than do Eastern roads with which it connects, and that the public pay fifty per cent. more for express matter over its road than over Eastern roads, because it traverses a sparcely settled country and contends with greater obstacles in procuring its supplies."

Notwithstanding which your petitioner avers that the judgment of the Court of Claims only gives and allows to the Union Pacific the same compensation for carrying the mails that the government gives and allows to the railroads in Missouri and Iowa, with which appellant's road connects.

Your petitioner, upon information and belief and the advice of counsel, states that the rates of compensation stated and fixed in the said letter of its President, of date September 1, 1876, for mail service, were fair and reasonable and not in excess of the rates charged by the appellant company generally and without discrimination to the public for the same and similar services; that this was shown and established by the evidence produced by the Railway Company, and that the United States called no witness to show and did not in any manner show or prove that such rates thus fixed and charged by the Railway Company were not fair and reasonable or in excess of what is charged to and paid by the public for the same or like services.

XII.

Your petitioner further represents that it is advised by counsel and believes, and therefore avers, that in respect of the said issue, to wit, what is fair and reasonable compensation for the transportation of the said mails, it is of right entitled to have findings of fact bearing upon the said issue in the nature of a special verdict, to the end that on the appeal to this Honorable Court, now pending, it may have the judgment of this Honorable Court as to whether or not the findings of the Court of Claims in this behalf set forth is correct and just to appellant, and that without such findings this Honorable Court will have no means of determining as to the correctness of the said judgment of the Court of Claims, and that without special findings of fact bearing upon and having relation to the service required of, and performed by, the appellant, and the appliances necessary to be used, and which were used by the appellant, and the other facts in said requests for findings set forth, an appeal to this Court for a review of the said judgment of the said Court of Claims will be, as it fears, without avail.

Your petitioner further represents that it requested the Clerk of said Court to incorporate said requests in the record in this case, and particularly the motion and the said requests thereto attached, hereinbefore referred to, and also petitioned said Court to direct the same to be incorporated in the record, which request and petition were refused, as will more fully appear by reference to the same, and the opinion of the said Court thereon, hereto attached and made a part hereof, marked Exhibit A.

To the end, therefore, that appellant may have a record in said cause which shall be sufficient to enable this Honorable Court to review the said judgment of the Court of Claims in the respect hereinbefore referred to, and to the end that the appellant may have the full benefit of the statutes conferring the right of appeal and the right to have the judgment and decree of said Court of Claims fully reviewed by this Honorable Court, your petitioner prays that the said cause be remanded to the Court of Claims with directions to the said Court to make specific findings in respect to each and all of the said requests for findings hereinbefore set forth; and that such other orders may be issued to said Court as may be necessary to secure to appellant such record as may be essential to a full review of the judgment of said Court in said cause.

JOHN F. DILLON,
SHELLABARGER & WILSON,
Attorneys for the Appellant.

Exhibit A.

COURT OF CLAIMS.

Nos. 14389, 12515, and 11901 (Consolidated).

THE UNION PACIFIC RAILWAY COMPANY VS. THE UNITED STATES.

CLAIMANT'S REQUEST TO CLERK.

To the Clerk of the Court of Claims:

The Union Pacific Railway Company having taken an appeal in this cause, under sections 707, 708 and 5261 of the Revised Statutes of the United States giving such appeal, which last-named section also provides for hearing such appeal by the Supreme Court on the merits, you are hereby requested and directed by the said appellant in making up the record of appeal for the Supreme Court to embrace therein, in addition to the pleadings, the opinion and final judgment or decree of the Court, the findings of fact by the Court of Claims and its conclusions of law thereon, the following, to wit: All requests to find facts submitted by either party to the Court, and particularly the requests for finding of facts marked A and B, annexed to a motion heretofore filed in said cause by the said Union Pacific Railway Company, on or about the 1st day of June, 1885, and the said motion and the order or opinion of the Court thereon.

JOHN F. DILLON,
SHELLABARGER & WILSON,
Attorneys for Claimant.

Filed September 10, 1885.

CLAIMANT'S REQUEST TO COURT.

To the Honorable the Judges of the Court of Claims:

Claimant, the Union Pacific Railway Company, respectfully shows:

1. That from the judgment of the Court in the above-entitled cases (consolidated) on the 21st day of

August, A. D. 1885, the defendants took an appeal to the Supreme Court of the United States.

2. That on the 22d day of August, A. D. 1885, the claimant likewise appealed to said Supreme Court from the said judgment.

3. That the claimant has filed with the clerk of the said Court of Claims a præcipe requesting and direct-said clerk to insert in the transcript of the record to be filed in the said Supreme Court all the requests of the claimant for findings of facts filed by the claimant under the rules of the Court, and especially the requests mentioned in and attached to a motion filed by the claimant asking that the Court find the facts specified in the said requests attached to the said motion, which said motion and the requests thereto attached, and which are already of record, claimant prays may be considered as a part of this petition.

4. Claimant further respectfully represents that it is advised by counsel and therefore avers that the insertion of the said requests hereinbefore alluded to in the said record is important to the due and proper presentation of the matters involved in said case to the said Supreme Court of the United States, and especially with reference to the determination of the question as to what is a fair and reasonable compensation for the transportation of the mails.

PRAYER.—Claimant therefore prays that the said clerk be directed by the Court in the preparation of the record to insert therein the said claimant's requests for findings of facts hereinbefore mentioned.

JOHN F. DILLON,
SHELLABARGER & WILSON,
Attorneys for Claimant.

Filed September 14, 1885.

ORDER TO THE CLERK.

Upon the foregoing requests, the Court directs the clerk to embrace in the transcript of the record to be certified to the Supreme Court all that is therein asked for *except* "all requests to find facts submitted by either party to the Court and particularly the requests for findings of facts, marked A and B, annexed to a motion heretofore filed in said cause by said Union Pacific Railway Company, on or about the 1st of June, 1885, and the said motion and the order or opinion of the Court thereon," which will be omitted.

Opinion.

Richardson, Ch. J., filed the opinion of the judges who heard the case.

The "Regulations prescribed by the Supreme Court of the United States under which appeals may be taken from the Court of Claims to said Supreme Court" prescribe as follows:

> Rule 1. In all cases hereafter decided in the Court of Claims, in which, by the Act of Congress, such appeals are allowable, they shall be heard in the Supreme Court upon the following record, and none other:
>
> 1. A transcript of the pleadings in the case, of the final judgment or decree of the Court, and of such interlocutory orders, rulings, judgments and decrees as may be necessary to a proper review of the case.
>
> 2. A finding by the Court of Claims of the facts in the case, established by the evidence, in the nature of a special verdict, but not the evidence establishing them; and a separate statement of the conclusions of law upon said facts on which the Court found its judgment or decree. The findings of fact and conclusions of law to be certified to this Court as part of the record.

In the present case the Court made and filed, at the time of entering judgment, "a finding of the facts in the case established by the evidence, in the nature of a special verdict" (20 C. Cls. R., 70), and it will be certified as part of the record required by the second paragraph of the above rule.

The requests for findings of fact submitted by the parties before trial are for the assistance of the Court, and not for the purpose of laying a foundation for review on appeal. They no more form part of the record for appeal than do the briefs and printed arguments. Nor can the parties make them part of the record by annexing them to a motion requesting the Court to find separately and specifically as to each one. Such a motion adds nothing to the requests previously filed, but merely renews them, and the Court was bound to do no more upon the motion than it was required to do upon the requests when first submitted, and that was to make "a finding of the facts established by the evidence," which was done, and the same will be embraced in the transcript of the record.

No motion has been made for a new trial, specifying errors or omissions in the findings, and none such have been suggested to the Court in any form (*Calhoun's Case*, 14 C. Cls. R., 193; *Roche's Case*, 18 C. Cls. R., 289).

In our opinion the Supreme Court would not undertake to compare the findings of this Court with the voluminous requests of the parties (embracing more than eighty printed pages), for the purpose of determining whether or not we had covered the whole ground, and, therefore, would not sanction the sending up of such a mass of useless matter.

In the case of *De Groot* (5 Wall., 419, and 7 C. Cls. R., 5), Mr. Justice Miller, speaking for the Court, said: "We take this occasion to say that we shall adhere strictly to the rules we have prescribed, and shall regard no other matter found in the transcripts sent to us than what they allow, and that in proper cases the cost of the useless part of the record will be taxed against the party who brings it here."

In overruling the claimant's motion of June 1, to have the Court find separately and specifically as to each one of its requests, we expressed our views on this subject, and on further reflection we reaffirm the same and make them part of this opinion. (See 20 C. Cls. R., p. 508.)

EXHIBIT B.—Showing different bases of compensation for mail service as shown by the testimony.

MEMORANDUM *in Relation to Weight of the Mails, February 1, 1876, to December 31, 1882.*

PERIOD.	No. of days.	Weights reported by Department. Slater's Ev. 603.	Reduced to actual on Dep't's basis.	Revised Approximate Average.
		Pounds.	*Pounds.*	*Pounds.*
Feb. 1, 1876, to March 31, 1878	790	15,348	13,161	A—14,885
April 1, 1878, to Jan. 31, 1880	671	19,369	16,609	A—18,952
Feb. 1, 1880, to March 31, 1882	790	24,833	21,295	A—23,367
April 1, 1882, to Dec. 31, 1882	275	29,665	25,439	B—27,855

AAA. One-half of the increase added to the "Reduced" Weights, as per Slater's evidence, (Record, p. 604.)

B. 2416 pounds per day added, based on the percentage of increase from 1880 to 1882, viz., 19 per cent in about *two* years.

14,885 lbs	790 days	11,759,150 lbs.
18,952 lbs	671 days	12,716,792 lbs.
23,367 lbs	790 days	18,459,930 lbs.
27,855 lbs	275 days	7,660,125 lbs.
	2,526 days	50,595,997 lbs.

Average per day, both ways	20,030 lbs.
Average per day, one way	10,015 lbs.

The Post-office Department has allowed the Union Pacific Company for postal services rendered on the route between Council Bluffs, Iowa, and Ogden, Utah, the following sums (see Record, p. 658):

February 1, 1876, to February 13, 1876	$11,614 46
February 14, 1876, to March 31, 1876	49,189 26
April 1, 1876, to June 30, 1876	95,497 20
July 1, 1876, to June 30, 1878	695,861 44
July 1, 1878, to October 19, 1879	490,538 41
October 20, 1879, to June 30, 1880	270,420 34
July 1, 1880, to January 1, 1882	672,347 41
January 2, 1882, to June 30, 1882	226,872 30
July 1, 1882, to December 31, 1882	255,103 40
	$2,767,444 22

Revising the average weights carried to conform to the methods of the Post-office Department, and allowing for the natural increase in the weights between the various weighings, the allowances of the Department are equal, for the whole period, to 5.469 cents per pound.

On the readjustment of pay for 1876, based on 14,885 lbs. per day, the compensation averaged...	6.40	cents per lb.
On the readjustment of pay for 1876, based on 18,952 lbs. per day, the compensation averaged...	5.44	do do
On the readjustment of pay for 1880, based on 23,367 lbs. per day, the compensation averaged...	5.24	do do
On the readjustment of pay for 1882, based on 27,855 lbs. per day, the compensation averaged...	5.02	do do

MEMORANDUM *in relation to Gross Express Earnings per pound, February* 1*st*, 1876, *to December* 31*st*, 1882, *excluding extra cars*, i.e., *cars carrying fish and fruit.*

Pounds carried, February, 1876, to October, 1879, inclusive (Record, p. 324)............		14,040,551
Pounds carried November, 1879, to December, 1882, inclusive, ascertained on the basis of 9 cents per pound (Record, p. 313)..		22,347,271
Pounds........................		36,387,822
Gross express earnings, February, 1876, to October, 1879, inclusive (Record, p. 324)..........................		$1,562,721 04
Gross express earnings, November, 1879, to December, 1882, inclusive (Record, p. 692)......	$2,161,600 00	
Less earnings of extra cars (Record, p. 325)..................................	150,345 57	
		2,011,254 43
		$3,573,975 47
Average gross express earnings per pound, excluding extra cars		9.8219 cents.
Amount that would be due the company for mail compensation if the above ascertained rate was to be applied..		$4,969,488 22

MEMORANDUM *in relation to Net Express Earnings per pound, February* 1*st*, 1876, *to December* 31*st*, 1882, *excluding extra cars*, i.e., *fish and fruit cars.*

Pounds carried, *supra*.............		36,387,822
Gross earnings, excluding fruit and fish cars, February, 1876, to October, 1879.	$1,562,721 04	
Estimated expenses, 20 per cent. (Report Commissioner of Railroads, 1879, p. 30)...........................	312,544 21	
		$1,256,176 83

Gross earnings, November, 1879, to December, 1880	$681,400 00	
Less extra cars, *i.e.*, fish and fruit (Record, p. 325)	32,704 11	
	$648,695 89	
Expenses, 23.833 per cent. (p. 691)	154,603 69	
		$494,092 20
Gross earnings, year of 1881	697,900 00	
Less extra cars (*i.e.*, fish and fruit cars)	51,711 52	
	$646,188 48	
Expenses, 26.902 per cent. (p. 691)	173,837 62	
		472,350 86
Gross earnings year of 1882	$782,300 00	
Less extra cars (*i.e.*, fish and fruit cars)	65,929 94	
	$716,370 06	
Expenses, 29.884 per cent. (p. 691)	214,080 03	
		502,290 03
Total net earnings		$2,718,909 92
Average net express earnings per pound, excluding extra cars		7.472 cents.
Amount that would be due the company for mail compensation if the above ascertained rate was to be applied		$3,780,532 89

MEMORANDUM *showing the Average Gross Earnings per pound of express matter and of extra cars (fish and fruit) from February 1, 1876, to December 31, 1872.*

Gross Earnings, excluding extra cars, Feb. 1, 1876, to Oct. 31, 1879 (p. 324)		$1,562,721 04
Gross Earnings, express, including extra cars, Nov., 1879, to Dec., 1880 (p. 692)	$681,400 00	
Less extra cars entered herein as a special item	32,704 11	
		648,695 89
Gross Earnings, express, including extra cars, year of 1881 (p. 692)	$697,900 00	
Less extra cars entered herein as a special item	51,711 52	
		646,188 48
Gross Earnings, express, including extra cars, year of 1882 (p. 692)	$782,300 00	
Less extra cars entered herein as a special item	65,929 94	
		716,370 06
Gross Earnings, extra cars, Feb. to Dec., 1876, 82 @ $450 (p. 17)		36,900 00

Gross Earnings, extra cars, year of 1877, 51 @ $450...	$22,950 00
do do year of 1878, 113 @ $450.	50,850 00
do do Nov. & Dec., '79, 6 (p. 325)	2,403 04
do do year of 1880, 73 (p. 325)...	30,301 07
do do year of 1881, 125 (p. 325)..	51,711 52
do do year of 1882, 155 (p. 325).	65,929 94
ADD estimated number of extra cars, January to October, 1879, based on transportation of such cars in 1877, viz., 51 cars; 1878, 113 cars; and 1880, 73 cars; in all, 237 cars, or average per year, 79 cars; 79 cars for 1879, less 6 cars already reported, leaves 73 cars @ $450 each......	32,850 00
Gross express and extra car earnings.......................	$3,867,871 04

Weight of ordinary express matter, February 1876, to October, 1879 (p. 324)..	14,040,551 lbs.	
Weight of ordinary express matter, November, 1879, to December, 1882, @ 9 cts..........................	22,347,271 lbs.	
Weight in 678 extra cars, estimated at 20,000 lbs. each..........................	13,560,000 lbs.	
		49,947,822 lbs.

Average gross earnings per pound, express matter and extra cars..	7.7438 cts.
Amount that would be due the company for mail compensation if the above ascertained rate was to be applied..	$3,918,052 81

MEMORANDUM *showing the average Net Earnings per pound of express matter and of extra cars (fish and fruit) from February 1, 1876, to December 31, 1882.*

Gross earnings, not including extra cars, February 1, 1876, to October 31, 1879..........................	$1,562,721 04	
Gross earnings, extra cars, February to December, 1876..........................	36,900 00	
Gross earnings, extra cars, year of 1877..........................	22,950 00	
Gross earnings, extra cars, year of 1878..........................	50,850 00	
Gross earnings, extra cars, January to October, 1879, estimated..................	32,850 00	
	$1,706,271 04	
Estimated operating expenses, 20 p. c..	341,254 21	
		$1,365,016 83
Gross earnings, including extra cars, November, 1879, to December, 1880...	681,400 00	
Operating expenses, 23.833 p. c............	162,398 06	
		519,001 94
Gross earnings, including extra cars, year of 1881..........................	697,900 00	
Operating expenses, 26.902 p. c..........	187,749 06	
		510,150 94

Gross earnings, including extra cars, year of 1882	$782,300 00	
Operating expenses, 29,884 p. c.	233,682 53	$548,617 47
NET express and extra car earnings		$2,942,787 18
Weight of express matter and contents of extra cars, as per preceding memorandum		49,947,822 ℔s.
Average NET earnings per pound, express matter and extra cars		5.8917 cents.
Amount that would be due the company for mail compensation if the above ascertained rate should govern		$2,980,964 36
Amount due the company if the NET earnings per pound of express matter and of the contents of extra fish and fruit cars is to govern (see p. 6)		$2,980,964 36
The above is the amount after allowing for all express expenses. To net the company as much as this, the Government should pay an amount in addition to cover the expenses incurred by the company in handling the mail at stations. The express and extra-car matter handled amounts to nearly the same in weight.[*] Estimating the mail expenses at ONE-HALF of the express expenses ($925,083.86), we have (an average of $183.11 per day; or, for 57 stations, $3.21 each per day; or for 1035 miles, 18 cents per mile per day)		462,541 93
The mail would then pay an average of 6.805 cents per pound, or		$3,443,506 29

The roads connecting at Council Bluffs, Iowa, with the main line of Union Pacific Railway Company recognize the peculiar physical characteristics of the line by making it an allowance of fifty per centum more than the ordinary through rates, if divided on a mileage basis, would yield. In other words, each mile of the main line counts in such divisions for at least one and a half miles. The allowances of the Post-Office Department were the same for the Union Pacific line as they were to any other line rendering the same amount of service.

---

[*] Mail Matter, 50,595,997 pounds; Express and Extra-car Matter, 49,947,822 pounds.

The Post-Office Department has allowed, as per page 2, for the period from February 1st, 1876, to December 31st, 1882	$2,767,444 22
Fifty per cent. added	1,383,722 11
And which, if paid for postal service, would yield to the Union Pacific Company	$4,151,166 33

An allowance of this amount would be equal to 8.204 cents per pound.

RESUME.

Allowances of the Post-Office Department, 5.469 cents	$2,767,444 22
At gross express rates, *excluding* fish and fruit cars, 9.8219 cents	4,969,488 22
At net express rates, *excluding* fish and fruit cars, 7.472 cents	3,780,532 89
At gross express rates, *including* fish and fruit cars, 7.7438 cents	3,918,052 81
At net express rates, *including* fish and fruit cars, 5.8917 cents	2,980,964 36
At net express rates, including fish and fruit cars with an allowance to cover expenses of the postal service, 6.805 cents	3,443,506 29
At the rates governing in the division of other business, 8.204 cents	4,151,166 33

Fares of postal clerks and agents, not included in any of the above computations	$605,978 44

CHARLES FRANCIS ADAMS, JR., being duly sworn, does state that he is the president of the appellant Railway Company; that he has read and knows the contents of the foregoing petition; that the same is true of his own knowledge, except so far as it relates facts stated on information and belief and the advice of counsel, and as to these he believes the same to be true.

CHARLES FRANCIS ADAMS, JR.

Subscribed and sworn to before
me this 18th day of November,
A. D. 1885, at the City, County
and State of New York.

WM. J. HARDING,
[SEAL] Notary Public,
Kings County, N. Y.

Certificate filed in N. Y. City.

BURGOYNE'S "Quick" Print, 146-150 Centre St., N. Y.

Supreme Court U. S.

154+402

IN THE

Supreme Court of the United States.

THE UNION PACIFIC RAILWAY COMPANY,
Appellant,

AGAINST

THE UNITED STATES,
Appellee.

No. 1034.

Amendment to Petition and Motion of Appellant to Remand the Record to the Court of Claims.

And now comes the said appellant in the above entitled case, THE UNION PACIFIC RAILWAY COMPANY, and for amendment to the petition heretofore filed, and as a supplement thereto, respectfully represents and shows to the Court:

1. That the said suit in said petition and in this amendment and supplement referred to, was brought by appellant against the United States under and in pursuance of section 2 of an act approved March 3, 1873 (17 Stats., 508), entitled "*An Act making appropriations for the legislative, executive and judicial expenses of the Government for the year ending June 30,*

1874, and for other purposes," which said section has been incorporated in the Revised Statutes as sections 5260 and 5261, as follows:

"Sec. 5260. The Secretary of the Treasury is directed to withhold all payments to any railroad company and its assigns on account of freights or transportation over their respective roads of any kind, to the amount of payments made by the United States for interest upon bonds of the United States issued to any such company, and which shall not have been reimbursed, together with the five per centum of net earnings due and unapplied, as provided by law.

"Sec. 5261. Any such company may bring suit in the Court of Claims to recover the price of such freight and transportation; and in such suit the right of such company to recover the same upon the law and the facts of the case shall be determined, and also the rights of the United States upon the merits of all the points presented by it in answer thereto by them; and either party to such suit may appeal to the Supreme Court; and both said Courts shall give such cause or causes precedence of all other business."

2. That under, in pursuance of and in conformity with, the rules of the Court in that behalf, the said appellant prepared, and before the trial, submitted to the Court requests for findings of fact, which said request are fully set forth in the original petition, to which this is amendment, and therein and thereby, under and according to the rules of the Court requested the Court to make findings in respect of the said requests.

3. That after the trial of said case and before any judgment had been announced or entered therein, the attention of counsel for appellant and for the Government having been called to the findings or proposed findings of the Court, and it having been made known to the counsel what the findings of fact were, as made by the Court on its own motion, and it thereby having

been brought to the attention of the counsel for the appellant that the Court had failed or refused to find specifically in respect of facts so requested, and that the Court had prepared no finding of facts in respect of what was a fair and reasonable compensation for carrying the mails other than finding No. XVI., Record, p, 23, set forth in the original petition, thereupon on June 1, 1885, and before any judgment was rendered or entered in the cause, counsel for appellant made and submitted to the said Court of Claims the following motion, to wit:

COURT OF CLAIMS.

Nos. 14389, 12512 and 11901.

THE UNION PACIFIC RAILWAY COMPANY v. THE UNITED STATES.

MOTION OF CLAIMANT.

The claimant, the Union Pacific Railroad Company and the Union Pacific Railway Company, now comes and states to the Court that it deems it essential to the right determination of the matters in issue in the above-entitled cases, that the Court should pass upon and find what is established by the evidence, embodied in the record in such cases, regarding the several and respective requests for findings of fact, as set forth in the requests for findings of fact, heretofore filed in this case, now hereto annexed and marked A and B, and made part of this motion; and, therefore, hereby again presents and files in the cases the said requests for such findings, and moves the Court to find the same severally and respectively; or, in the event that the Court should reach the conclusion that it ought to refuse such requests for such respective and several findings, then that the Court will enter of record such refusal to so find as to each of the requests as to which the Court shall so refuse to find.

Filed June 1, 1885.

John F. Dillon,
Shellabarger & Wilson,
Attorneys for Claimants.

4. That said motion having been duly and in open Court submitted to the Court, the same was denied and the following order was made thereon, to wit:

ORDER OF COURT.

The foregoing motion, to which are annexed 48 printed pages of requests for findings of fact, filed after the Court had completed its findings and made the same known to the parties, is overruled, on the ground that the Court has fully complied with the rules of the Supreme Court in relation to appeals (Rules I., IV. and V.) in the findings already made, and is not bound to rule or find separately and specifically on each request of the parties. Precisely the same requests were filed by the claimant before the trial of the case, as required by Rule V. of the Supreme Court and the rules of this Court now numbered 52, 53 (20 C. Cls. R., xix). In connection with 34 printed pages of requests filed by the defendants, they were each and all thoroughly examined and considered by the Court, and were passed upon in its finding of facts; and that finding contains all the facts established by the evidence and deemed material to the due presentation of the case.

A copy of the Opinion of the Court of Claims, delivered in support of its said ruling and order, and of its omission and refusal to make a finding of facts, as requested by the appellant, is annexed hereto and marked Exhibit No. 1.

5. Your petitioner further represents that notwithstanding it is stated in the said order of the Court above quoted that it, the Court, had fully complied

with the rules, and notwithstanding the statement in said order that the findings contained all the facts proven deemed to be material to the case, appellant nevertheless avers the truth to be that the only compliance with the rules was the finding No. XVI., above alluded to; and notwithstanding the statement in said order, that the findings contain all the facts proven deemed to be material to the case, claimant represents that it is advised by counsel, and therefore avers, that the Court had not fully complied with the rules in respect of the finding of fact; and while it cannot deny that the said finding No. XVI. was, by the said Court of Claims, all the finding that it deemed material, appellant nevertheless avers that the said finding does not contain all the facts which appellant deemed, and still deems, to be material for the determination of its legal rights in the premises.

6. Your petitioner further represents that it is advised by counsel, and, therefore, avers that each request so made and presented to the Court was and is material to a full and complete determination of the rights of your petitioner on the said issue, as it is advised by counsel, and therefore avers, and upon such advice petitioner avers that it was entitled to have each of said requests passed upon affirmatively or negatively, and the ruling thereon entered of record; and that a finding of facts stated in each of said requests are "necessary to a proper review of the case," and "material to the due presentation of appellant's case in the findings of fact."

7. Your petitioner further represents that on the 10th day of September, 1885, it made application to

the said Court of Claims to have the said requests and its said special motion to the Court to make findings upon said requests made a part of the record to be transmitted to this Court on appeal, which motion and the ruling thereon is attached to the original petition in this behalf marked Exhibit " A."

Petitioner states that by the two several applications to the Court of Claims hereinbefore referred to it has sought to procure from the said Court specific findings in respect of the said several requests, or the facts therein mentioned, but the said Court of Claims has failed and refused to make findings thereon, or in respect thereto, as in said original petition averred.

8. Your petitioner further represents that all the evidence adduced in said case is in writing and a part of the files of the said Court in said case and that the same is now attainable for the purpose of making a complete transcript of all the proceedings, orders and rulings in said cause and the evidence adduced in the trial thereof.

9. Your petitioner further avers that prior to the first trial of the said case in the said Court of Claims the said claimant, appellant, by counsel, and the said defendant, by the Assistant Attorney-General, entered into a stipulation, of which the following is a copy, to wit:

UNITED STATES COURT OF CLAIMS.

THE UNION PACIFIC RAILROAD COMPANY
vs.
THE UNITED STATES OF AMERICA.
} Petition No. 12,515.

It is hereby agreed that the above-entitled cause shall be submitted to the Court for judgment upon the the facts and stipulations that follow, viz.:

I.

If the petitioner has a right to recover from the Government for the transportation of mail agents and clerks, then the sum due the petitioner on account of the charge made therein for fares of postal clerks and agents during the period from February 1, 1876, to September 30, 1877, will be $140,000.

II.

That as to so much of the claim of the petitioner as relates to postal services for the Government, if the compensation for such services is not to be fixed by reference to the Act of Congress, approved July 1, 1862 (12 Statutes at Large, 489), especially section 6 of the same, and the subsequent acts amendatory thereof, but by the general laws regulating the compensation for similar service by railways, then the entire amount due the petitioner under its said petition for such services will be six hundred and eighteen thousand nine hunhundred and ten dollars and fifty-four cents ($618,910.54). (See Exhibit A, hereto attached.)

III.

That if the compensation to be paid petitioner for postal services as aforesaid is to be fixed by reference to the special Acts of Congress as distinguished from the general laws, before named, and if the average rate charged by petitioner and paid by parties for the transportation of express matter, so called, is to be deemed "fair and reasonable rates of compensation," then such average rate, excluding from the computation the amount charged for cars containing fruit, fish, and perishable articles hauled in passenger trains, makes due the petitioner, under its said petition, the sum of one million thirty-eight thousand five hundred and three dollars and twenty-five cents ($1,038,503.25) as the entire amount due for such services. See Exhibit A, hereto attached.)

IV.

That if the amount charged upon cars transporting fruit, fish and perishable articles hauled in passenger trains, shall be included as express business, then the entire sum thus due the petitioner for transportation of the mails aforesaid will be eight hundred and seventeen thousand seven hundred and ninety-nine dollars and twenty-five cents ($817,799.25). (See Exhibit A, hereto attached.)

V.

That if the amount charged upon cars transporting fruit, fish, and perishable articles hauled in passenger trains, shall be considered the same kind of service as that performed for the Government in transporting the mails, excluding from the computation the amount charged for all other express business, then the sum due the petitioner for the mail services aforesaid will be two hundred and thirty-two thousand two hundred and ninety-five dollars and twenty-five cents ($232,295.25).

VI.

Upon the preceding facts and those hereinafter stated, the case is submitted to the Court for its determination of the principles or rules applicable to the petitioners right to recover upon its claim as set forth in stipulations 1, 2, 3, 4 and 5, respectively, aforesaid, and to enter such judgment therein, and upon the counterclaim of the United States, as the law requires.

The cars containing fruit, fish and perishable articles are moved in the same trains as the cars containing mail and express matter. These cars are received from and delivered to connecting roads. Their contents need no handling or transfer, and there is no terminal expense except for switching the cars themselves. The cars are loaded to their full capacity, averaging about ten tons each, and the contents require no special care in transit.

The cars containing the ordinary and regular express matter are furnished with a safe, and are fitted with sleeping and other accommodations for one messenger. The Railroad Company does its own express busines. It collects and delivers express matter without extra charge, and is responsible for any loss or damage. One express messenger accompanies each car, unless on special business an additional messenger is detailed. The company maintains a special organization for conducting its express business, having express offices in all the larger towns, but generally the regular agent of the company attends to its express business.

The cars containing the mail are built and fitted up by the company upon plans prescribed by the Post-Office Department, and are furnished complete at the company's expense. Light, fuel, water, ice, &c., are also furnished by the company as required. Ten of these cars are used by the company and are fitted up with all facilities for handling and distributing the mail as required by the Postmaster-General, and also with sleeping accommodations for postal employees.

The mail is received from and is delivered to all post-offices on the route by the railroad company when the post-offices are within eighty rods of the railroad. The mail is also handled by station employees when it is received from and delivered to connecting lines, and this company pays its proportionate expense of the same. From one to five post-office employees travel on each postal car, who handle, distribute and sort the mail on board the car. The Postmaster-General in his discretion imposes a fine upon the company for any delay or non-delivery of the mails.

In the above computation of sums due the company the weight is taken at fifteen thousand (15,000) pounds daily average, that being the quantity found by the Post-Office Department to have been carried daily for thirty consecutive days.

VII.

There is due the defendant upon its counterclaim, if the petitioner's claim of $1,038,503.25 for mail service is allowed by the court, seven hundred and three thousand and eleven $\frac{82}{100}$ dollars, as five per cent. upon the total net earnings of the claimant during the period specified in the counterclaim.

If the court shall award the petitioner its claim of $140,000 for transportation of mail agents and clerks, or any part thereof, the amount of the five per cent. above mentioned will be increased by five per centum on the additional amount so allowed.

If the court shall award the petitioner an amount for mail service less than the amount claimed therefor as above stated, the amount of the five per centum of net earnings above mentioned will be reduced by deducting therefrom five per centum on the difference between the amount so claimed and the amount awarded by the court. (See Exhibit F, hereto attached.)

The exhibits marked A, B, C, D, E and F, attached to these stipulations, may be referred to as forming part of the same [and as being computations correctly made up by the Government, but what constitutes express matter is not to be affected by the classifications therein contained].

VIII.

It having by Stipulation I, above, been agreed between the parties that the sum of $140,000 is due to the petitioner for the transportation of mail agents and clerks if by law it is entitled to recover compensation for such service, and the Government being desirous of an opportunity to correct the amount thus charged for said service, if upon further scrutiny it shall be deemed by it erroneous, it is agreed that if the Government at any time before final judgment after appeal to the Supreme Court, if such appeal be taken, shall desire to correct said amount, their proposed corrections, unless assented to by the petitioner, shall be submitted to the Court of Claims.

Inasmuch as the foregoing stipulations do no not embrace or cover any claim of the company for compensation per service over the Omaha Bridge, and the approaches thereto, other than so far as the bridge is a part of the road, it is hereby agreed that any claim for additional or separate compensation is reserved to the claimant, and the right of neither party in respect thereof is in no way affected by said stipulation or by this suit.

SIDNEY BARTLETT,
Per SHELLABARGER & WILSON.
SHELLABARGER & WILSON,
Attorneys for Claimant.
THOMAS SIMMS,
Assistant Attorney-General.

April 14, 1881.

Exhibit A.

COURT OF CLAIMS.

UNION PACIFIC R. R. CO.
vs. } 11,901.
THE UNITED STATES OF A.

MEMORANDUM AS TO STIPULATIONS.

No. 1.	Total amount of clai...m		$2,268,437 54
	Less postal service stated in petition,		
Jany., 1876		$27,095 25	
Feby., March, 1876		99,462 50	
6 qrs. multiplied by $149,193.75		895,162 50	
			1,021,720 25
	Difference, "other service"		$1,246,717 29

No. 2. Feby. 1, 1876, to Sept. 30, 1877:
20 months, at $7,000 per month $140,000

No. 3. Mail compensation as found by the Post Office Department (See Exhibit D):

$39,310 62, Jany. 1 to Feby. 13, 1876, = 44 days, $315 per mile for 1,032.4 m., or per day, $893.55.

49,189 32, Feby. 14 to Mch. 31, 1876, = 47 days, $369 per mile for 1,032.4 m., or per day, $1,546.58

95,497 20, April 1 to June 30, 1876, = 1 qr. @ $381,988.80 per an. for 1,035.2 m., or $369 per mile.

347,930 72, July 1, '76, to June 30, 1877, 1 year @ $336.10 per mile for 1,035.2 miles.

86,982 68, July 1 to Sepo. 30, 1877, 1 qr. @ $336.10 per mile for 1,035.2 miles.

$618,910 54 = $45,144.43 (postal car sett. May 24, '80) plus $573,766.11 (amounts found due per old settlements 84,634.11 — 1st qr. 1876; 87,992.00 — 2d qr. 1876; 401,140.00 — 5 qrs. to Sept. 30, 1877).

No. 4.	As per petition, Jany. 1 to 31, 1876	$27,095 25
	As per item No. 207 on statement (Exhibit B).	1,011,408 00
	Total	$1,038,503 25
No. 5.	As per petition, Jany. 1 to 31, 1876	$27,095 25
	As per item No. 33 in statement (Exhibit B)	790,704 00
	Total	$817,799 25
No. 6.	As per petition, Jany. 1 to 31, 1876	$27,095 25
	As per item No. 30 in statement (Exhibit B)	205,200 00
	Total	$232,295 25

Which stipulation was considered and used as a stipulation in the second trial of said cause from which the appeal now pending in this Court was taken.

10. Your petitioner further avers that on the first day of September, 1876, the president of the claimant company addressed a letter to the Postmaster-General, a copy of which is set forth at page 23 of the original petition herein, which said letter was before the said Court of Claims as evidence in said case, treated and received as such, and without objection on the part of the defendant (appellee).

PRAYER.

Your petitioner therefore prays that an order may be directed to the said Court of Claims to send up to this Court the entire record in said case, including the interlocutory rulings and all the evidence on which the case was heard; or, if, in the judgment of this Court, this order cannot be made, then that the said case be remanded to the said Court of Claims with an order that said last-named Court shall specifically pass upon, affirmatively or negatively, each of said requests, or make a finding of facts on the subjects embraced in each of said requests, and that the said Court shall be directed to incorporate in the record in this case the said stipulation hereinbefore set forth, and the said letter hereinbefore referred to, and in the original petition set forth as hereinbefore averred, and for such other and further order as this Court shall deem just and proper and to justice shall appertain.

JOHN F. DILLON and
SHELLABARGER & WILSON,
Attorneys for the Appellant Railway Company.

Exhibit No. I.

COURT OF CLAIMS.

Nos. 14,389, 12,515 and 11,901.

(*Reported in 20 Court of Claims Rep., 508.*)

THE UNION PACIFIC RAILWAY COMPANY VS. THE UNITED STATES.

MOTION OF CLAIMANT.

The claimant, the Union Pacific Railroad Company and the Union Pacific Railway Company, now comes and states to the Court that it deems it essential to the right determination of the matters in issue in the above-entitled cases that the Court should pass upon and find what is established by the evidence, embodied in the record in such cases regarding the several and respective requests for findings of fact as set forth in the requests for findings of fact heretofore filed in this case, now hereto annexed and marked A and B, and made part of this motion; and, therefore, hereby again presents and files in the cases the said requests for such findings, and moves the Court to find the same severally and respectively; or, in the event that the Court should reach the conclusion that it ought to refuse such requests for such respective and several findings, then that the Court will enter of record such refusal to so find as to each of the requests as to which the Court shall so refuse to find.

Filed June 1, 1885.

JOHN F. DILLON,
SHELLABARGER & WILSON,
Attorneys for Claimants.

ORDER OF COURT.

The foregoing motion, to which are annexed 48 printed pages of requests for findings of fact, filed after the Court had completed its finding and made the same known to the parties, is overruled, on the ground that the Court has fully complied with the rules of the Supreme Court in relation to appeals (Rules I., IV., and V.) in the findings already made, and is not bound to rule or find separately and specifically on each request of the parties. Precisely the same requests were filed by the claimant before the trial of the case, as required by Rule V. of the Supreme Court and the rules of this Court now numbered 52, 53 (20 C. Cls. R., xix.). In connection with 34 printed pages of requests filed by the defendants, they were each and all thoroughly examined and considered by the Court, and were passed upon in its finding of facts; and that finding contains all the facts established by the evidence and deemed material to the due presentation of the case.

OPINION.

RICHARDSON, Ch. J., delivered the opinion of the Court.

Rules IV. and V. of the Supreme Court, in relation to appeals from the Court of Claims, are now as follows:

"RULE IV. In all cases in which either party is entitled to appeal to the Supreme Court, the Court of Claims shall make and file their findings of facts and their conclusions of law therein, in open court, before or at the time they enter judgment in the case.

"RULE V. In every such case each party, at such time before trial and in such form as the Court may prescribe, shall submit to it a request to find all the facts which the party considers proven and deems material to the due presentation or the case in the finding of facts."

Formerly the provisions of Rule V. were quite different, and were as follows:

"In all such cases either party, on or before the hearing of the cause, may submit to the Court a written request to find specifically as to any matter of fact which such party may deem material to the judgment in the case; and if the Court fails or refuses to find in accordance with such prayer, then such prayer and refusal shall be made a part of the record certified on the appeal to this Court" (9 Wall., VII.).

After several years' trial experience proved that the practice under the old Rule V. led to great difficulties and embarrassments, without contributing in any degree to the better presentation of the case. The requests for findings of fact filed by the parties were often so diffuse in language, and so interspersed with irrelevant matter, evidence and propositions of law, either directly or inferentially, that a satisfactory finding or ruling upon each one separately could not well be made, and if made, its bearing upon the case, as presented by the findings of the Court, drawn with reference to each other and all properly connected together, was difficult to ascertain.

Accordingly the Supreme Court changed that rule several years ago (January 29, 1879). As it now stands this Court is not required to find specifically and separately as to all matters of fact in the form requested by the parties. It must make "a finding of the facts in the case, established by the evidence, in the nature of a special verdict," to constitute part of the record upon which the case may be reviewed by the Supreme Court on appeal, as prescribed by the second paragraph of its first rule on the subject; and that has been done in the present case (*ante*, p. 70).

The requests required to be submitted by the parties are for the assistance of the Court in making up its finding, and not for the purpose of obtaining specific rulings on each one separately in the form by them presented.

The practice of the Court is to give to the requests of the parties the fullest consideration and the most careful scrutiny, and without finding or ruling upon each one separately, to make up an accurate and connected finding in its own language, in such way as to cover every material fact asked for on either side, and to present to the Supreme Court on appeal a clear and concise statement of the case, upon which questions of law arising may be there reviewed.

If the claimants present request should be complied with, the Supreme Court on appeal would have before it two series of findings, and if also a like course should be pursued in reference to the defendant's requests, it would have three series, instead of one as contemplated by its Rule I., paragraph 2, above mentioned. That would lead to difficulty if not to confusion and uncertainty.

The motion is overruled.

Jeremiah M. Wilson, being duly sworn, deposes and says that he is the counsel for the Appellant Railway Company, and has been one of the counsel therefor since the original institution of this suit, and during its progress. That he has read and knows the contents of the foregoing Amended Petition and Motion, and that the matters therein stated upon the knowledge of this affiant are true, and all of the other matters therein stated he believes to be true.

Sworn to before me
this day of
1885.

IN THE

Supreme Court of the United States.

THE UNION PACIFIC RAILWAY COMPANY,
Appellant,

AGAINST

THE UNITED STATES,
Appellee.

No. 1034.

Brief on the Petition and Motion of the Appellant Railway Company.

STATEMENT.

1. By section 6 of the Act of July 1, 1862, entitled "An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military and other purposes" (12 Stats., 480), it was stipulated that the United States should pay to the Union Pacific Railroad Company for carrying the mails a fair and reasonable compensation therefor, not exceeding the amount paid by private parties for the same kind of service.

2. For service rendered to the United States in carrying the mails prior to the 30th of June, 1878, the company brought suit against the United States in the Court of Claims.

Act March 3, 1873, 17 Stats. at Large, 508, now Rev. Stats,. Secs. 5260, 5261.

3. The case was tried in the Court of Claims, and that Court held at the first trial that under sections 4001–4004 the Postmaster-General had the right to fix the compensation for this company the same as for other companies, and rendered judgment accordingly.

4. The judgment of the Court of Claims was by this Court reversed, mainly upon the ground that the sections of the Revised Statutes above mentioned had no application to the Union Pacific Railroad Company, but that that company, by the contract existing between it and the United States (section 6, Act July 1, 1862, above alluded to), was entitled to a fair and reasonable compensation for the service rendered.

U. P. Ry. Co. vs. U. S., 104 U. S., 662.

5. The case having been remanded to the Court of Claims for a new trial, the United States filed a counterclaim alleging, among other things, that the company was indebted to the United States or was liable to pay 25 per centum of its net earnings from and after the 30th day of June, 1878, under and in pursuance of the provisions of the Act of Congress, approved May 7, 1878, commonly known as the Thurman Act (see 20 Statutes, 56).

6. To this the company replied that the United States was indebted to it on account of carrying the mails from the 30th day of June, 1878, to the 31st of Decem-

ber, 1882, in a certain amount of money, at fair and reasonable rates for transportation of the mails, not exceeding the amount paid by private parties for the same kind of service.

Thus this question was made, to wit: What was such fair and reasonable compensation for the service rendered by the company to the Government in the transportation of the mails?

On this issue much testimony was taken for the purpose of showing what service was most nearly like the service rendered in carrying the mails, the value thereof, and what was paid by the public or private parties therefor. The company took testimony of a number of witnesses, practical railroad men and experts, to prove that the EXPRESS SERVICE was, of all the services rendered by the company for the Government or for the public, the most similar to, and in fact was substantially identical with, the mail service; to prove that the cars in which the mail was carried were similar in point of size, weight, fittings, the carriage of messengers, and in all other respects, to the cars in which the mail service was rendered.

It also produced testimony showing the earnings of the company from the express service, comparing the receipts per pound of express matter with what the earnings would be from the transportation of the mails, applying the rate per pound received from express matter to the weight of the mails transported.

Evidence was likewise produced for the purpose of making a comparison of earnings per car of PASSENGER CARS in the same trains in which the mails were carried.

Also evidence to show the similarity between FIRST CLASS FREIGHT and the transportation of the mails and the compensation received by the company from the public for such first class freight; and the additional amount which the company should receive for carrying such freight on its passengers trains.

Also evidence to show what rate per pound was paid by passengers for EXTRA BAGGAGE transported in the same trains. Also evidence to show that in the transportation of the mails the Government did not confine itself to the cars which it had required to be built for the specific purpose of carrying the mails, to wit, postal cars; but in addition thereto used the baggage car in the same train, and frequently an extra car—all on the company's passenger trains.

Also evidence to show that in the transportation of the mail, once a month one way, and twice a month the other way, the Australian mail was transported in a separate car specially devoted to that purpose.

Also evidence to show that in the exchange of business between the Union Pacific Railway Company and its connecting roads on the east, such connecting roads allowed to the Union Pacific Company, in the division of earnings on through business, ONE AND A HALF FOR ONE; or, in other words, made the Union Pacific Company an allowance of a mile and a half for each mile of its road as compared with one mile of the connecting road, thus conceding to the Union Pacific Company a higher rate of compensation per mile than the connecting roads on the east received; and this because of the fact that the Union Pacific Company passed through a comparatively uninhabited region of country, and was more expensive to operate and keep in repair. The evidence was undisputed, and the fact was admitted by the United States, that this concession to the Union

Pacific Company had been made to it by all connecting companies continuously for many years, and was still conceded.

This statement indicates sufficiently the scope of the testimony adduced on the trial resulting in the judgment from which the present appeal has been taken. The details of this evidence are more fully indicated by the requests for findings of fact which are made a part of the petition now under consideration. These requests were presented under and in pursuance of the Rules of Court in that behalf, accompanied with the statement of counsel, that they considered the facts therein stated, to have been proved and deemed them to be material to a due presentation of the case in the findings of fact. To these requests for findings, we now refer as showing the character of the testimony that was adduced on the trial of the cause, and to which reference will hereafter be more fully made.

As to the facts so requested to be found there was little, if any, dispute. The facts existing as stated in these several requests, so far as the same have reference to the different kinds of service therein referred to, and the appliances and instrumentalities used by the company for the performance of these various services, the earnings therefrom, the cost of operating the road, the concessions made by other companies to the claimant, &c., as shown in said requests, were fully proved by the testimony (see the petition, p. 6, *et seq.*).

The Court of Claims made no finding whatever upon these several requests. That Court ignored them entirely in its own findings. Its only finding as to the compensation for transporting the mails is as follows:

> "The amounts allowed and retained by the Treasury Department for transportation of mails as aforesaid are a fair and reasonable compensation for the service and not in excess of the rates paid by private parties, for the same kind of service" (R., p. 23).

On which it found, as a conclusion of law, "*that no question of law arises on that finding*" (Record, p. 34).

The evidence showed that the allowance made by the Department was at the same rate and on the same basis as was made to other roads generally. The above quoted finding is simply a finding in the nature of a general verdict, and one question which we now present to the Court is whether such finding is, under the legislation relating to the Appellant Company, and under the circumstances of this case, a compliance with the statutes giving an appeal to this Court and the regulations prescribed by this Court concerning appeals from the Court of Claims.

Another question is, whether, under the Act of March 3, 1873 (now Rev. Stats., sections 5260, 5261), the company is not entitled to have the entire record in the Court of Claims, including the evidence, sent to this Court; or, if not, whether it is not entitled to have all the facts proved in the Court below, material to the question at issue, put into the record for the consideration and judgment of this Court.

BRIEF.

As to the right of appeal under the Act of March 3, 1873 (now Rev. Stats., Secs. 5260, 5261.

THIS SUIT WAS BROUGHT under an Act of Congress passed March 3, 1873 (17 Stats. at Large, p. 508, now Revised Statutes, Secs. 5260 and 5261), which in its second section is as follows:

> "SEC. 2. That the Secretary of the Treasury is directed to withhold all payments to any railroad company and its assigns, on account of freights or transportation over their respective roads, of any kind, to the amount of payments made by the United States for interest upon bonds of the United States issued to any such company, and which shall not have been reimbursed, together with five per cent. of net earnings due and unapplied as provided by law; and any such company may bring suit in the Court of Claims to recover the price of such freight and transportation; and in such suit the right of such company to recover the same upon the law and facts of the case shall be determined, and also the rights of the United States upon the merits of all points presented by it in answer thereto by them and either party to such suit may appeal to the Supreme Court; and both said Courts shall give such cause or causes precedence of all other business."

The express contract was that the Government should retain and apply only *half* of the companies' earnings for Government transportation. This Act distinctly violated that contract by directing *all* such earnings to be withheld. But it provided specially that any of the companies might sue in the Court of Claims, and that "in such suit the right of such company to recover *upon the law and the facts* of the case, and also the rights of the United States shall be determined upon the *merits*, and either party may *appeal* to the Supreme Court, and both Courts shall give the cause precedence over all other business."

This is special legislation applicable to this case; and it is submitted that the intention of Congress is manifest that the legal rights of the parties were to be finally determined by the Supreme Court as well as by the Court of Claims "upon the law and the facts of the case," and that such determination should be upon the *merits*. The right thus expressly and specially given to have the case heard in this Court, upon the facts proved in the Court below, has been denied by the Court of Claims.

In this case Congress never intended that the Court of Claims should be anything but the conduit through which the case would come to this Court upon fts broad merits.

Standing upon this legislation as the special law of the case, and without reference to the general subject of appeals from the Court of Claims, we insist,

That the Railway Company is entitled to have the whole evidence certified to this Court for consideration *de novo*, or, if not, that it is entitled to have all facts proved below which it considers to be material put into the record for the consideration and judgment of this Court.

THE ORDINARY JURISDICTION OF THE COURT OF CLAIMS and the ordinary right to appeal and the mode of appeal from its judgments were well known to Congress when the Act of March 3, 1873, was adopted. The suits authorized by that act related to matters of exceptional gravity, and hence Congress made the special provisions therein contained as to the right to sue, the manner in which the suits should be heard and determined and giving to each party the right of appeal. *This legislation covered the whole ground and was complete in itself.*

It was not amendatory of, supplemental to, or *in pari materia* with the general legislation respecting the Court of Claims and its general jurisdiction, or sections 707, 708, of the Revised Statutes, authorizing appeals from its judgments. Indeed, it may reasonably be presumed that the purpose that Congress had in view by the specific provisions in the Act of 1873, as to suits and appeals, was to prevent the case from falling within the provisions of the general legislation and regulations touching the powers and procedure of the Court of Claims.

If sections 707 or 708 were repealed to-morrow, or if they had been repealed at the time the present judgment was rendered, the right of either party to appeal therefrom conferred by the Act of March 3, 1873, and the effect of such appeal, would be untouched.

Section 707 gives the United States an appeal in all cases, but to the plaintiff only where the amount in controversy exceeds $3,000. Could it be contended that this last limitation applied under the Act of 1873, which gives "either party" the right to appeal from any judgment that might be rendered in the suit?

As the Act of 1873 confined the right of the company to sue the United States to the Court of Claims; as that Court is not a common law court having a jury; as the nature of the suits authorized, would require the examination of long and intricate, as well as mutual, accounts; and as the questions arising in such suits would be novel and difficult and involve large pecuniary interests to both parties, Congress specially provided that such suit should be "*determined upon the law and facts of the case upon the* MERITS OF ALL *points* presented," and "that either party to such suit might *appeal* to the Supreme Court." If there is no other legislation that changes the meaning of the word "appeal," as here used, is there any ground to doubt that Congress intended to give to the word "appeal" its usual and in Federal legislation, its invariable meaning? And we insist that the word "appeal," as here used, has no reference to section 708 of the Revised Statutes, and the rules of this Court adopted by its authority, and that its meaning is not changed or affected by them.

There are two allied reasons why the Act of 1873 is the one which applies to and governs this case. The first is, that special legislation with respect to particular parties and subject matter controls prior general legislation, and the other is that a subsequent act complete in itself, and particularly a special act, not referring to, or dependent upon, any other legislation is the one which must be resorted to in order to ascertain the legislative will as to all matters for which it makes provision.

These are familiar principles founded on obvious and solid reasons.

The judgment of this Court, when this cause was here before (104 U. S., 662), affords a striking illustration of the principle that the special legislation contained in the company's charter, was not controlled or affected by general legislation that was, in its terms, broad enough to embrace it.

The legislature passed two acts on the same day upon the subject of escheats. One was special, the other formed part of the Revised Statutes.

BY THE COURT:

> "The special act must be intended to constitute an exception to the general act or provision; especially where such general and special acts are contemporaneous, as the legislature is not presumed to have intended a conflict."

A fortiori is this, the case where the special act is subsequent. Nor is the legislature to be presumed to have passed the subsequent special act without any necessity or purpose, and thus deprive it of any effect or operation.

As to the right of appeal under Revised Statutes sections 707, 708, and the true construction of the rules prescribed by the Supreme Court in respect of appeals from the Court of Claims.

IT IS EVIDENT, from the history of the legislation concerning the establishment of the Court of Claims and its jurisdiction, that its power to render judgments binding upon the Government as well as upon the claimant without being submitted to Congress for revision would never have been conferred except for the contemporaneous provision that either party should have an absolute right to appeal to the Supreme Court. Accordingly, that right was given and made absolute. It was added that such appeal should be allowed under such regulations as the Supreme Court might direct. These provisions are embodied in the Revised Statutes (Sections 707, 708). It is a subject of great moment to determine what the right of appeal essentially involves. It is a subject in which the Government is as much concerned as suitors in that Court.

WE PROCEED now to consider the questions presented by the Petition, under the sections 707 and 708 of the Revised Statutes.

Section 707 provides that an "*appeal*" shall be allowed on behalf of the plaintiff where the amount in controversy exceeds three thousand dollars. And section 708 provides that such appeals "shall be allowed under such regulations as the Supreme Court may direct."

The word appeal has a fixed signification in Federal legislation. It is expressed by this Court in the case of the U. S. vs. Goodwin, 7 Cranch, 111, in these words: "An appeal is a civil law process and removes a cause entirely, subjecting the law and *fact to a review and retrial.*"

In the Judiciary Act, and in all the legislation of Congress concerning the Federal tribunals, the word "appeal" has always been used in this sense and in no other, unless the contrary intent has been expressed, as for example, in the Act of February 16, 1875, C. 77 (18 Stats., 315), as to admiralty appeals, and the Act of April 7, 1874 (18 Stats., 27), as to appeals from territorial Courts.

When, therefore, by Sec. 707 it was provided that the party should be entitled to an appeal to this Court, it was a provision that he should in this Court have a retrial on the facts as well as the law.

The provision (Sec. 708) that the appeal should be allowed under such regulations as this Court might direct, was not intended to authorize the Court by rules or regulations to deny or restrict the right of appeal, or to deprive the appellant of any substantial benefit involved in the right of appeal. It is submitted that this Court could not, and by the rules which it has promulgated on this subject did not, intend to curtail or abridge any right or benefit fairly implied in the absolute right to an appeal which the statute gives, and without which Congress would never have given the Court of Claims power to render final judgments.

Such Rules could only regulate the *manner* of exercising the right; and they were not intended to arm the Court of Claims with the power to annihilate (as it has effectually, however undesignedly, done in this instance, if its action is final) all substantial benefits involved in the right of appeal, and to make the right itself, for all useful purposes dependent upon an uncontrolled and uncontrollable discretion in the Trial Court as to whether it will or will not make a finding of facts so specific and certain as to meet the requirements of a special verdict, to the end that the Supreme Court shall have before it all the data of fact and law necessary to render exact justice between the parties. Any construction of the Rules which denies to the unsuccessful party the right to have, in some form, the judgment of the Supreme Court upon the facts of his case, would at the same time show that the Rules themselves were not authorized by the statute.

To the end that this Court might have before it all the material facts which constitute the cause of action or the defense, its rules require the Court of Claims to find "the facts in the case," that is all the facts, and also to find the facts "*in the nature of a special verdict*," the purpose and effect of which (as distinguished from a general verdict or finding) is well understood and settled.

In no other view can the validity of the Rules be sustained for a single moment.

The "regulations" on this subject as they now stand are as follows:

> "Rule 1. In all cases hereafter decided in the Court of Claims, in which, by the act of Congress, such appeals are allowable, they shall be heard in the Supreme Court upon the following record, and none other.
>
> * * * * * * *
>
> "2. A finding by the Court of Claims of the facts in the case, established by the evidence, *in the nature of a special verdict*, but not the evidence establishing them, and a separate statement of the conclusions of law upon said facts on which the Court found its judgment or decree. The finding of facts and conclusions of law to be certified to this Court as part of the record."
>
> "4. In all cases in which either party is entitled to appeal to the Supreme Court, the Court of Claims shall make and file their findings of facts and their conclusions of law therein, in open Court, before or at the time they enter judgment in the case.
>
> "5. In every such case, each party, at such time before trial and in such form as the Court may prescribe, shall submit to it a *request to find all the facts which the party considers proven and deems material to the due presentation of the case in the findings of fact*."

Have these "regulations" been complied with?

The finding of the Court of Claims is as follows (repeated here for convenience):

> "The amounts allowed and retained by the Treasury Department for transportation of mails as aforesaid are

a fair and reasonable compensation for the service and not in excess of the rates paid by private parties for the same kind of service" (R., p. 23).

The Court of Claims twice refused to make any other or further finding on this subject, and twice refused to pass upon the special requests relating thereto contained in the petition under consideration.

Its conclusion of law (Record, p. 34), referring to the said sixteenth finding of fact, is thus expressed:

"NO QUESTION OF LAW ARISES ON THAT FINDING."

And is this the measure of an appellant's rights under the Act of 1873, under sections 707, 708, Revised Statutes, and under the Rules of this Court?

This Court, when the case was here before (adopting the language of the Court of Claims), said that for the purpose of determining what was fair and reasonable it was proper to survey the entire field of service, and that such compensation was to be determined upon a consideration of all facts material to the issue.

104 U. S., 662.

There was in this case a distinct issue of fact, viz., what is fair and reasonable, not exceeding what is paid by private parties for the same kind of service. The finding above quoted is not a finding of the facts in the case, established by the evidence, "in the nature of a special verdict."

It is no better for the purposes of an appeal than the naked judgment of the Court would be without any finding of facts whatever.

If this had been the sole issue in the case, and the Court had found, as it did, simply that the amount allowed is fair and reasonable," "therefore it is adjudged that the claimant take nothing," the appeal from such a judgment upon such a record would be an entirely idle and useless step, because there is nothing before the appellate Court upon which the judgment could be reviewed. Neither by the statute nor by the regulations, was it intended that the Court of Claims should thus by its omission and refusal to find the facts in the nature of a special verdict preclude the appellant from testing the correctness of the judgment of the Court of Claims. On the contrary, the regulations prescribed by this Court intended the preservation of this right. We deny that this Court could make a regulation which would, under the circumstances of this case, sustain the sufficiency of the finding in question, against the objection of the appellant company.

If the question is open for consideration as to the power of the Supreme Court under section 708 to make the findings by the Court of Claims of the facts in the nature of a special verdict conclusive upon the appellate Court, and to preclude the right to retrial on the facts as proved in the trial Court as well as the law, we insist that the power to regulate the allowance of appeals has no such scope, and we desire the judgment of this Court upon the point. But, if in this we are mistaken, we then insist that the Rules prescribed by this Court can only be sustained by holding that, taking Rules 2, 3 and 5 together, they require the Court of Claims to make a finding "in the nature of a special verdict" upon or in relation to "all the facts which the party making the application for such finding deems to be proved and to be material to the due presentation of the case in the findings of fact."

The true construction of the Rules of this Court regulating Appeals from the Court of Claims sustains the right of the Petitioner to the action now asked.

There have been several changes in the phraseology of the Rules. The word "ultimate" in the original rules as descriptive of the facts required to be found, has been dropped. This was done, undoubtedly, to prevent the Court of Claims from supposing that such a bald, general finding as we are now questioning, was all that was required. From the beginning it has been required that the facts shall be found "*in the nature of a special verdict.*" From the beginning a party has had the right to present to the Court every fact which he deemed material to the presentation of his case, and have a finding in respect thereto.

Rule 5, adopted in 1869, provided in terms that if the Court failed or refused to find specifically in accordance with the written request of the counsel, that such request and refusal should be made part of the record and certified on appeal to the Supreme Court. This part of Rule 5 was changed in 1879, and the 5th Rule, as it now stands, was adopted in its place. But this rule still allows the party to request the Court to find all the facts which *he* deems material to the due presentation of his case in the findings of fact.

It is material to determine the effect of the change in the rule. The rule (Rule 2) requiring "A finding by the Court of Claims of the facts in the case, established by the evidence in *the nature of a special verdict,*" was left untouched; and the substituted Rule 5 expressly allows each party to submit to the Court a request to find *all* the facts which *the party* considers proven and deems material to the due presentation of the case in the findings of fact."

We submit and insist that this change of the rule effected no change in the substantial rights of an appellant. It related only to the practice in the Court of Claims, and under Rule 5, as it stands, the Court of Claims is as much bound as it was before the adoption of the present rule, to make a full and complete finding upon all facts deemed by the party to be material.

If it be true (which we deny) that it need no longer pass upon each request in the form presented by counsel, and place such specific ruling on record; it is and must be true that it must find or refuse to find every fact which is "necessary to a proper review of the case," or which "the party considers proven, and deems material to the due presentation of his case in the findings of fact." Such requests require judicial action. The result of such action is a "ruling" or order, and by the Rules such ruling or order becomes part of the record, whenever necessary to a proper review of the case.

Under the former Rule 5 the refused requests of the appellant would be part of this record on which, without more, the appellant could have based the present motion. Under the 5th rule as it stands, and upon the record, as the Court of Claims ordered it to be made up, this petition or motion is necessary as a means of bringing before this Court in the exercise of its supervisory jurisdiction, the requests which were asked and refused by the Court of Claims, to the end, that this Court may order the Court of Claims to make the required findings.

The Court of Claims in its opinion on the company's motion of June 1, 1885, (before the appeal) (printed as Exhibit I to Amended Petition) for a more specific finding, and in its opinion and order refusing to allow its clerk to certify to this Court the rejected prayers of the appellant company (which last opinion and order are printed in the Appendix to the present Petition as Exhibit A, pp. 35–38), seems to suppose that Rule 5 in its present form was intended to effect a most substantial change in the duty of the Court and in the substantial rights of the unsuccessful party. Speaking of the new Rule 5, it says:

> "The requests for findings of fact submitted by the parties before trial are for the assistance of the Court and not for the purpose of laying the foundation for review on appeal."

The opinion of the Court of Claims proceeds on the ground that the amendment of the Fifth Rule of the Supreme Court, striking out the provision that if the Court fail to find as prayed for, the prayer and refusal shall form part of the record, was designed to enable the Court, "without ruling upon each one (of the requests) separately * * to make up accurate findings in such a way as to *cover* every material fact asked for by either side."

Of course a general finding as a fact that the evidence fails to support the plaintiff's case would cover every material fact asked for by the defendant; but when the finding is not a mere negative one, but introduces and affirms as an ultimate fact a proposition which can be only claimed to be a result arrived at after weighing and holding that the facts prayed for by the company are immaterial, either those facts must be found in order to enable the Court of Appeals to pass upon their materiality, or their truth must be distinctly negatived. Without this the mere general finding of an ultimate fact would make the Court omnipotent.

Again, what warrant is there for the assumption that the amendment of the rule was made to produce the above result, and this for the reason that requests or prayers are "often diffuse in language, interspersed " with irrelevant matter, evidence and propositions " of law, so that a satisfactory ruling upon each " could not well be made." At law such imperfections in exceptions may be a declared ground for their rejection, but what court or statute ever made this the ground of a rule excluding all exceptions?

Again, the rule, as it now stands amended, provides for the submission to the Court of Claims of written requests "to find specifically as to any matter of fact *which such party may deem material* to the judgment in the case." Now, are such requests to form any part of the record? If not, the provision amounts to a declaration merely that parties may file a brief in a cause to be regarded or disregarded by the Court in its judgment. If they form part of the record, what is their validity or effect unless they are to be disposed of in the judgment? In our view the amendment of the rule was for the purpose of rejecting surplusage. It was wholly unnecessary to provide by the rule that such prayers may be filed for the protection of the rights of the parties, and then add that it should form part of the record. At all events, it seems clear that the rights of the appellant company on its present Petition and Motion are just as broad as they were under the former

Rule 5, which in terms made the rejected prayers part of the record.

BUT THERE IS A BROADER VIEW OF THE WHOLE SUBJECT. Section 707 of the Revised Statutes gives an appeal to the claimant in any case where the amount in controversy exceeds $3,000. Section 708 provides "that all such appeals shall be allowed under such *regulations* as the Supreme Court may direct." *Thus the right of appeal is absolute.* Ordinarily such appeal carries with it the whole case. If proceedings in the Court of Claims are to be deemed equitable proceedings, an appeal contains the entire proofs. But under this power to make provisions regulating appeals, which would literally be confined to the formalities attending such appeals, and not to carry with it the power to restrict appeals, the Supreme Court has required findings by the Court of Claims of facts "in the nature of a special verdict." *Now, can any Court in directing or shaping a special verdict refuse to require a finding of any fact deemed by either party material to the decision of the case? If it should so do, clearly an exception would lie.*

The present fifth rule expressly recognizes the right of either party to require a finding of any fact he deems material be included in the special verdict.

These considerations clearly show that the Supreme Court did not, and could not, intend to *substantially annihilate* the right of appeal given in clear terms by the statute, but rather to preserve the rights of an appellant, by enabling him to review in the appellate court the effect of all facts (without spreading the evidence upon the record) which in his view bear upon the finding of an ultimate fact or facts on which the case rests.

THESE VIEWS are sustained by the language of the rule—" in the nature of a special verdict"—and by the object of the rules, which was to get all the material facts on the record, without encumbering it with the evidence, thereby avoiding the necessity and consequent labor on the part of the Supreme Court of examining the case *de novo.*

The Rule does not say that the finding is strictly a special verdict, but *in the nature* of a special verdict.

The language is apt for the purpose intended.

It is well known that in a special verdict all the facts to raise the disputed questions of law are fully set forth, but not the evidence of the facts.

A special verdict is always entered of record, and the appellate Court notices it as part of the record.

Burr vs. Des Moines Co., 1 Wall., 102, 1863,
per MILLER, J.

It must consist of ultimate facts with such sufficiency, fullness and precision as to have none of the functions of the jury to be discharged by the Court, and should not contain the evidence of such ultimate facts.

Ib., p. 102.

A special verdict must state facts and not evidence tending to establish facts.

Seward vs. Jackson, 8 Cow., 406.
Hill vs. Cowell, 1 N. Y., 522.
Sisson vs. Barrett, 2 *Id.*, 406.
Langley vs. Warner, 3 *Id.*, 327.

Every practitioner knows that in general the special verdict is drafted by the counsel (subject, of course, to the superintending control of the Judge), and submitted to the jury. But it was never heard of that such control extended so far as that the Judge could as of right disregard the judgment of the counsel concerned as to what facts were material to go into the special verdict. It cannot be determined at that stage what facts may prove to be material. The materiality and legal effect of the facts are for subsequent consideration when the verdict has been set down for argument.

> "*According to the English practice, the minutes of a special verdict intended to be found, ought to be signed by one of the counsel for each party, and should be approved by the Judge*, it being his province to take care that the question of law be fairly stated; and they ought to be delivered to the jury before they find a verdict. If all the counsel of one party refuse to sign the minutes, the Judge may direct the jury to find a verdict from the minutes as signed by the counsel of the other party (Bac. Abr. title, Verdict, let. D). And if the verdict be defective, so that the Court cannot give judgment thereon, they will amend it, if possible, by the notes of counsel, or the memory of the Judge who tried the cause. Tidd Pr., 897" (quoted Pittsburgh, &c., Ry. Co. vs. Ruby, 38 Ind., p. 308).

In Wallingford vs. Dunlap, 14 Penn, St., 31, the following language is used by the Court: "The special verdict is defective. We have no power to amend it. *It is the duty of plaintiff's counsel* to have the special verdict properly drawn up, settled and entered on record (1 Johns. Cas., 393; Col. Cas., 104). If the facts are reduced to writing at the time of the trial, and have the assent of the jury, the verdict may be moulded into form afterward, with the approbation of the Court."

In Miller vs. Shackleford, 4 Dana (Ky.), 264, it is said:

> "A jury is not expected to be able (especially in a complicated case) to draw up a special verdict without assistance. The facts are to be found upon their own convictions and responsibility; the form of the finding and the sufficiency as to the extent of the facts embraced, must be looked into by the Court."

Again it is said in the same case:

"And objections have been taken to the supposed improper agency of the Court, and of the counsel by the permission of the Court, in producing the verdict as it was ultimately rendered.

"It seems that the counsel on each side was permitted to present the draft of a verdict, which, after being inspected by the Court, was submitted to the jury," with proper instructions. "Upon looking into the authorities on the subject of making up a special verdict, we are satisfied that there was not, in this instance, any excess of authority, or any undue interference on the part of the Court."

This case was cited and approved in Pittsburg, Fort Wayne & Chicago Railway Co. vs. Ruby, 38 Ind., 309.

"*The Court should not be required to prepare a special verdict, for many reasons.* In the first place, the opinion of the Court as to what had been proved would have undue influence with the jury. In the next place, the Court is required to pass upon the form and sufficiency of the special verdict. And in the third place, after the verdict has been returned, the Court is frequently required to pass upon motions for *venire de novo*, new trial, and in arrest of judgment; and this cannot be satisfactorily done, if the Judge has been required to prepare a draft of what he believed has been proved on the trial."

Pittsburg, &c., Ry. Co. vs. Ruby, 38 Ind., 310.

The judicial interpretation of the rules regulating appeals from the Court of Claims sustains the right of the appellant to the action of this Court which is now sought.

We proceed now to show by a careful review of the judgments of this Court that the foregoing views are fully sustained thereby and that the petitioner is entitled to the relief sought in the petition.

In United States vs. Adams, 6 Wall., 101, 1867: Held, that the Court cannot deprive a party of the right of appeal given by the statute; and will not dismiss the appeal because the Court of Claims has not complied with the rules of the Supreme Court as to the finding of facts:

Held, also, that where the Court of Claims had not sufficiently found the ultimate facts (Johnson's Case, 6 Wall., pp. 104, 111, 112), the Supreme Court would remand the record with directions to make a new finding of facts in accordance with the rules of Court on that subject.

United States vs. Adams, 9 Wall., 554, 1869: This was an application in the Supreme Court by a claimant (a judgment in whose favor by the Court of Claims had been reversed by the Supreme Court), showing that a material finding of fact by the Court of Claims was erroneous, and asking the Supreme Court to amend its decree, and to stay mandate in order to enable the claimant to obtain correction of the record in the Court of Claims, and that the cause be again reheard in the Supreme Court. Motion denied.

Nelson, J.: "The case presented will not justify the Court in the exercise of its *equitable powers* to grant this relief." He quotes the 2d rule, and then adds:

"The remedy in case the Court of Claims falls into a mistake as to the findings of fact, is familiar. It is by an application to this Court to remit back the case for correction if it be shown satisfactorily that a mistake has been committed." * * *On an appeal, the parties are entitled to have all the facts proved in the case before* *the Court below, in the judgment of the Court, truly found and stated in the record that either deemed material to the decision; and, as we have seen, the remedy is ample to correct any mistakes committed, if applied for prior to the hearing in this Court*" (9 Wall., p. 559).

Observe that this language was used in respect of the rights of the parties before the fifth rule, even if its original form had been adopted.

In another case in the same volume (*Adams vs. U. S.*, 9 Wallace, p. 661), in which the same Adams was claimant, and the United States defendant, the United States made a showing in the Supreme Court, *before* the hearing of the appeal, that "since the decision of the Supreme Court in the other case, it had become material for the Government to show the fact that the claimants voluntarily presented their claims to the Commission. This fact, though proof of it was alleged to have been offered in the Court below, was not stated in the findings of fact sent to this Court, probably not having been deemed material at the time."

This Court ordered the record to be remanded to the Court of Claims, and that said Court be instructed to find and certify, as matters of fact, in addition to facts found and certified in said record.

First, whether said claims were submitted to the Commission. Second, whether the claimants appeared before the Commission, &c.

BRADLEY, J.: "The proper method of obtaining a finding in reference to these alleged facts is an order of this Court, to be directed to the Court below, on motion duly made, *requiring that Court to make return as to the existence of such facts.* If that Court should refuse, with the proper evidence before it, to find a material *fact desired by either of the parties*, the proper remedy would be to make a request that such finding be made, and to except in case of refusal. Perhaps an additional rule on the subject would make the rights of the parties and the duty of the Court less ambiguous than they now are."

9 Wall., p. 663, A. D. 1869.

Afterwards, at the same term (Dec. Term, 1869), this Court adopted two new rules (viz., Rules 4 and 5) on this subject (9 Wall, p. VII.).

The cases of *Adams*, *supra*, 9 Wall., 554, 661, show that *prior* to the rules adopted in December, 1869, "the parties were entitled to have all the facts proved in the case before the Court below, in the judgment of the Court, truly found and stated in the record that either deemed material to the decision" (9 Wall, p. 559). And the duty extended to find "affirmatively or negatively" upon any fact "desired by either of the parties" (9 Wall, p. 663).

The adoption of the 5th rule in its original form, and the subsequent change thereof to its present form do not, it is clear, leave the rights of the parties in this regard any less or different than they were in 1869, when the foregoing decisions were made.

The case of *Mahan vs. U. S., 14 Wall., 109, 1871*, came before the Supreme Court after Rules 4 and 5 of December Term, 1869, were adopted. It was a motion under Rule 5 "to have all the evidence" (relating to a fact which the Court refused to find) which was before the Court of Claims brought here and have this Court decide the question [of fact] which he [the claimant] propounded to that Court (p. 111). This motion was overruled. Mr. Justice **Miller** explains the purpose of Rules 4 and 5.

"The fifth rule enables a party to obtain a finding of that Court on any question of fact arising in the case and *deemed by him* essential to its decision."

He adds, "The remedial purpose of this rule is that when a party has in writing indicated a specific question of fact on which he desires the Court of Claims to make a finding, and the Court has neglected or refused to do so, *this Court may be able to determine whether the question is one so necessary to the decision of the case that it will send it back for such finding.*"

14 Wallace, p. 112.

Can it be maintained for a moment that the purpose of the change made in 1879, whereby Rule 5 was cast in its present form, was substantially to restrict the remedial purposes of the original rule?

"Where the Court of Claims finds a fact and has at the same time presented as part of its finding all the evidence on which that fact was found, the Supreme Court will look at both findings to see whether that evidence was competent proof of that fact," and if not, will reverse.

U. S. vs. Clark, 96 U. S., 37 (1877).

In the U. S. vs. Pugh, 99 U. S., 265, 1878, the case turned upon the question of fact whether "it appeared that the proceeds of the cotton sued for in this case were actually paid into the treasury." The Court of Claims made no specific finding upon that fact, but it found certain "circumstantial facts" so-called, bearing upon that point, and gave judgment for the plaintiff. On the hearing in the Supreme Court, it was insisted by the plaintiff that this finding was conclusive. But this Court held otherwise. The Court, WAITE, C. J., said:

"Whether they (these circumstantial facts) establish the ultimate fact to be reached is, if a question of fact at all, to say the least in the nature of a question at law." * *

> "The question of practice to be settled is whether, under our rule, the judgment of the Court of Claims as to the legal effect of what may, perhaps not improperly, be called the ultimate circumstantial facts in the case, is final and conclusive, or whether it may be brought here for review on appeal." This Court reviewed these facts, made the proper inferences from, and applied the proper legal presumptions to them, and held that the judgment below when thus reviewed was right, and it was accordingly affirmed.

It is obvious that this case was very carefully considered by the Court. The Chief Justice speaking for the Court draws the distinction between mere evidence, and the facts which are established by the evidence, and uses the following language:

> "To avoid misapprehension in the future, we take this opportunity to say that we not only think such a judgment may be reviewed here if the question is properly presented, but that when the rights of the parties depend upon *circumstantial facts* alone, and there is doubt as to the legal effect of the facts, *it is the duty of the Court, when requested, to so frame its findings as to put the doubtful question into the record.* This would not require us on the appeal to decide upon the weight of evidence. That is done in the Court below, when the particular fact is found which the evidence tends to prove. The effect of mere evidence stops when the fact it proves is established. After that the question is as to the effect of the fact; and when the evidence in a case has performed its part and brought out all the facts that have been proved, these facts thus established are to be grouped and their legal effect as a whole determined. If the case could come here in such a form as to require us to consider the evidence, we should be required to trace the evidence to its logical results, find in this way all the facts that had been proven, and then declare the final legal conclusion. The rule relieves us from the necessity of considering the evidence at all, and confines our attention to the legal effect upon the rights of the parties of the facts proven as they have been sent up from the Court below.

In this way the weight of the evidence is left for the sole consideration of the Court below, but the ultimate effect of the facts which the direct evidence has established is left open for review here on appeal. The position which the case occupies when it comes here under such circumstances is precisely the same as it would be if the facts, instead of being found by the Court, had been agreed upon by the parties, and their agreement embodied in the record."

The contract between the Apellant Company and the Government was in its legal effect, as we shall show on the final hearing, that the Government should pay for Government service rendered by the Railway Company fair and reasonable rates to be fixed by the company, and that the agreed standard or test of what was fair and reasonable, was that they should not exceed the rates or amounts charged to and paid by private parties, that is, the public at large, for like or substantially similar services. The pertinency of the requests asked and refused is thus apparent. They related to the vital subject of what the public paid for like services. Conceding that under the 5th Rule as it stands, the Court was not bound to pass upon each one of these requests singly in the form presented, we insist that it was bound, when thus required by the appellant, to find every fact which was proved, and which bore upon the question what were similar services to the mail services, and what private parties paid to the Railway Company therefor.

"The duty of the Court" below is emphatically stated to be "when requested, so to frame its findings as to put the doubtful question" (which in Pugh's case was one of fact, or of law and fact closely connected) "into the record."

We have referred to this case at some length, because we are satisfied, upon careful reflection, that it fully covers in its principles everything which the appellant seeks in the present petition.

The language heretofore quoted from Pugh's case is referred to with approbation in the case of the Sun Mutual Insurance Company vs. The Ocean Insurance Company (107 U. S., 503). This case strongly illustrates the importance of the principle for which we are contending. In it the Circuit Court made specific findings of facts, and reached the conclusion as the result of those facts that the libellant was entitled to a decree against the defendant for certain amounts of money. This Court held upon the special facts found by the Circuit Court, that the conclusion which was reached by the Circuit Court of the United States could not be sustained, and accordingly dismissed the libel. Now, if this Court had had nothing before it except the conclusion of law, which was, that upon the facts found the libellant was entitled to a decree, that decree would have been absolutely unassailable. But having the facts before it—not the evidence, but the facts established by the evidence—reached an entirely different conclusion from that which was reached by the Circuit Court.

Our contention in this matter may be illustrated by what it is requisite to aver in a declaration. It is not sufficient to aver simply that a party is indebted, nor, on the other hand, is it proper to set forth the evidence by which the demand is to be supported. But it is necessary that the facts shall be alleged in the declaration, the result of which facts shows the indebtedness for which the suit is brought. And in this case there are "circumstantial facts" immediately connected with and having relation to the mail service which are material to be known in order to determine the issue between the parties, and without a knowledge of which facts this Court would have no means whatever to determine as to the soundness of the judgment that was rendered by the Court of Claims; just as in the case of the Sun Insurance Company, *supra*, this Court could not have corrected the error of the Circuit Court, but for a knowledge of the specific or circumstantial facts which were furnished by the findings of fact which in that case had been made by the Circuit Court.

We, again, beg the Court carefully to observe that, as to the present application to this Court, the underlying and controlling proposition is this: that the statutory contract with the Government, fixing our rate of compensation is one which embodies into itself as a method of ascertaining what is just and reasonable, the other fact, to wit, what is paid by private persons for the same kind of service.

The statute allows the company to fix the rates of compensation for its services for the Government, but provides that these shall be fair and reasonable, and the adopted test of whether they are fair and reasonable is that they shall not exceed what is paid by the public, that is, by private parties for the same kind of service. This is the scheme of all the English Railway Tariff Regulations Acts, viz., to leave the railway companies to fix their own rates, with the limitation only that they shall not charge one person or class of persons more than under like circumstances they charge all others. This proceeds upon the principle that what the public at large pays is the highest evidence of what is reasonable; and that this principle is sound was proved as a fact by the evidence of Mr. Albert Fink, the eminent railway expert, given in this cause. The statute therefore establishes a criterion by which to determine what is just and reasonable.*

Observe that it is as to this very fact, so made a criterion by the statutory contract, that the Court of Claims has refused absolutely to find any single fact, although the evidence bearing upon it was submitted as stated herein and the Court requested to make the findings

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* When this cause was here before (U. P. R. R. Co. vs. U. S., 104 U. S., 662), this Court said, in the opinion (p. 664): "*We have* "*no hesitation in conceding that the section quoted* [section 6] *consti-* "*tutes* A CONTRACT *between the United States and the Railroad Com-* "*pany*," and it was adjudged that the Railroad Company was entitled to compensation *at fair and reasonable rates, not to exceed the amounts paid by private parties for the same kind of service*, "ACCORD- "ING TO AND SUBJECT ONLY TO THE LIMITATION REQUIRED BY THE "SIXTH SECTION OF THE ACT OF 1862" (p. 668).

Confirmation, amounting almost to demonstration, that Congress in the sixth section of the Act of 1862, purposely intended to create a BINDING CONTRACT as to the rate of compensation for government service, and that it also intended that the company should have the power to fix rates which should be binding, unless they were unfair or unreasonable, of which the test was that they should not exceed the amounts paid by private parties for like services, is found in the debates on this subject on the passage of the Act of 1862. The bill was in charge of Mr. CAMPBELL, of Pennsylvania.

The following is the discussion in the House on the subject:

"MR. HOLMAN: I move to amend by *striking out* the words 'at "reasonable rates of compensation, not to exceed the amount paid "by private parties for the same kind of service,' and *inserting* in "lieu thereof the words '*at such rates of compensation as the Govern-* "*ment of the United States shall from time to time prescribe.*' The sec- "tion provides that the amount to be paid for transportation of "troops and supplies shall be at the same rates as may be paid by "private parties. *My amendment leaves the rates entirely at the dis-* "*cretion of the Government.* It seems to me that after such enorm- "ous grants as we are making of land, of bonds and of credit, the *thereon.* Now, our point is that this Court is powerless to determine, in the absence of the findings requested and refused, anything in regard to this question of fact: What was paid by private persons for similar services? or in regard to the relation between what was paid by private parties and what the Court found to be just and reasonable. Upon the relation between that judgment and this fact, made part of the statutory contract, we are entitled on appeal to the judgment of this Court. The case is thus brought, we submit, precisely within the rule requiring a special verdict and also

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" corporators in this great enterprise may well afford to leave to the Government of the United States the fixing of the rates for the transportation of troops and supplies. And I say, further, to the gentlemen especially interested in this question, that on the adoption or rejection of this amendment will depend certainly the votes of some gentlemen. There are many reasons why this bill ought to be passed, but it certainly will not be, unless its provisions are at least as favorable to the Government as to the corporators and capitalists who may be interested in the enterprise.

" Mr. Campbell: Mr. Chairman, the bill provides that Government shall have the preference in the use of this road for all purposes of Government transportation at fair and reasonable rates of compensation. *I do not see the propriety of allowing the Government to fix the rates.* The Government is not the owner of this road, unless the company fail to perform its part of the contract, in which case the Government is to take possession of it under its charter, or under a forfeiture or foreclosure of the mortgage. *But while the stockholders own the road, they certainly should have the privilege of fixing the rates of transportation. Why should the Government fix them?*

" Mr. Holman: Will the gentleman yield?

" Mr. Campbell: I will.

" Mr. Holman: The gentleman lays stress upon the words 'fair and reasonable compensation.' The only question is, who shall determine that? All I insist on is that the Government shall determine what is fair and reasonable, instead of these corporators.

" Mr. Campbell: I think that, as in the case of all other rail-within the language of this Court in *United States vs. Pugh*, 98 U. S., 270. What was paid by private parties for the same kind of service is in its nature not only a *circumstantial fact*, bearing upon the question of what is just and reasonable, but it is a fact made by the statute the criterion to determine the ultimate fact, what is fair and reasonable.

Now, this Court, at the case last cited, in speaking of such circumstantial facts, and the duty of the Court of Claims on request to find them, uses, as we have seen, this language:

"When the rights of the parties depend upon cir-

"road companies, the *company itself should have the right to fix the* "*rates; but they are controlled by the terms of the charter from fixing* "*unreasonable rates or making unfair charges.*

"MR. MORRILL, of Vermont: I would suggest to the gentleman "from Indiana to modify his amendment by inserting 'at the "average rates paid by the War Department during the past "year.'

"MR. HOLMAN: Oh, no. That average would exceed by thirty-"three and one-third per cent. the rates paid by individuals for the "like service during the same period of time.

"MR. MORRILL, of Vermont: Well, modify it by saying 'at the "lowest rate,' instead of 'at the average rate.'

"MR. HOLMAN: Oh, no.

"Mr. Holman's amendment was rejected."

MR. CAMPBELL (May 1, 1862), in the House, said:

"*We must aid this Pacific Railroad to the extent of paying on the business of the Government the ordinary rates of transportation, or such rates as will be paid by individuals.*"

Senator COLLAMER (June 19th, 1862) said:

"The reading is, that they are to pay the same price that private persons pay, and they pay whatever the railroad charges. That is all there is of it."

Senator LATHAM, in reply to this, said:

"The palpable, clear and honest intent on the part of Congress in making such a provision, is this: That the Railroad Company should charge the Government the same reasonable rate that it would charge private individuals for transporting the same characcumstantial facts alone, and there is doubt as to the legal effect of the facts, it is the duty of the Court, when requested, to frame its findings so as to put the doubtful question into the record."

And as above stated, this ruling is, in the case of the Sun Insurance Company, *supra*, expressly approved and reaffirmed.

We therefore respectfully submit that it is not a compliance with this rule for the Court of Claims to make a finding that amounts only to a general verdict, and to refuse to make special findings of fact in the nature of a special verdict. Nor is it within the pro-

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ter of goods. * * * Now, we have reserved the right in another section of the bill to add to, alter, change, modify or repea this charter if we choose; and I apprehend if any attempt was made by the Railroad Company to make an imposition of this kind, which would be nothing more than thieving and robbery, Congress would not hesitate for a moment to curtail their privileges."

The Equality Clause of the ENGLISH ACT OF 1845, *Section 90, still in force, is as follows:*

"Whereas, it is *expedient that the company should be enabled to vary the tolls upon the railway so as to accommodate them to the circumstances of the traffic*, but that such power of varying should not be used for the purpose of prejudicing or favoring particular parties, or for the purpose of collusively and unfairly creating a monopoly, either in the hands of the company or of particular parties; it shall be lawful, therefore, *for the company*, subject to the provisions and limitations herein, and in the special act contained, from time to time to *alter or vary the tolls* by the special act authorized to be taken, either upon the whole, or upon any particular portions of the railway, *as they shall think fit;* Provided that all such tolls be at all times charged *equally to all persons* and after the same rate, whether per ton, per mile or otherwise, in respect of all passengers and of *all goods* or carriages *of the same description*, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway *under the same circumstances;* and no reduction or advance in any such tolls shall be made directly or indirectly in favor or against any particular company or person traveling upon or using the railway."

vince of that Court to determine that it will or will not make any finding whatever in response to requests for findings by the parties to the litigation. If that Court can be permitted to utterly ignore and put into the waste-basket requests for findings of fact, and itself to make no findings whatever upon the subject, it defeats the very purpose of an appeal. The Rules authorize the claimant to submit to the Court the requests for findings upon all matters that bear upon the issues in the case, and at least the Court is required by these regulations to pass upon those requests just as a jury would be required to pass upon the questions submitted to them by a court for a special verdict. This it utterly failed to do.

The Materiality of the Requests.

The next question is, whether or not the requests that were made in this case in relation to facts are material to this issue? These requests are set out at length in the petition which is now being considered.

THE STATUTORY CONTRACT *makes it material* to inquire as to what is paid by private parties for the *same kind of service.* The company, as expressly allowed in the opinion of the Supreme Court in this case (104 U. S., 662), produced evidence as to the performance by the company, for private parties, of the same or substantially similar services to the mail service, and what was regularly paid therefor, and the rejected findings relate thereto. In consequence of such rejection and the omission of the Court of Claims to make any findings of its own upon the subject, the record on this appeal, as it now stands, is silent even *as to the existence of such similar services.* Hence, if the appellant proved the existence of similar services (as it undeniably did) and what was paid therefor (as it unquestionably did) then it has the absolute right, under the terms of the statutory contract, to have such facts before this Court on the appeal.

Evidence relating to what was paid by private parties for the same kind of service, viz.: service on passenger trains, was produced, and the findings of fact asked and refused relate to this subject.

> 1. Evidence relating to what the public paid for express service and to show the similarity of this service in its nature and cost to the mail service was produced on both sides.
>
> 2. Also evidence relating to the earning per car of the cars employed in the passenger service.
>
> 3. Also evidence relating to what the company charged and the public paid per pound for carrying extra baggage.
>
> 4. Also evidence relating to what the company charged and the public paid for carrying first class freight on passenger trains, and how much more it was worth for carrying the same class of matter in passenger trains.
>
> 5. Also evidence that connecting roads allowed the appellant company on through business 50 per cent. more than they themselves received, and the reason for such allowance.

Based upon these lines of evidence the specific requests to find, presented by the appellant, relate as before stated, to the kind of cars employed in carrying the mails, their weight, dimensions, numbers and fittings, and employees and messengers that were carried, and the delivery of mail at all post-offices within eighty rods of the railroad.

To the amount of Australian mail and the manner in which it was carried;

To the express cars, their size and weight and fittings, and the messengers accompanying them, the kind of matter carried as express, and the compensation received for it, and the expense incident to this express service ; and generally to the similarity of that service to the transportation of the mails ;

To the fact that no compensation has been allowed appellant different from that allowed to connecting roads for the same kind of service, although those connecting roads in the interchange of business allowed appellant fifty per cent. in excess of what they themselves received ; and although the cost of constructing, maintaining and operating appellant's road greatly exceeded the like expenses of the other roads.

To the fact that the country through which these mails were carried was sparsely populated, barren of timber ; that unusual appliances had to be resorted to to procure water with which to supply the engines ; that wages of employees are fifty per cent. higher than on Eastern roads ; that a portion of the road was through a mountainous region, operated at increased expense, requiring often two engines to carry the trains over heavy grades and for long distances ; that on extra baggage the company derives from the public $8\frac{1}{10}$ cents per pound ;

That this was substantially the same price that was derived per pound for carrying express matter, and, excepting express matter, was more nearly similar to the mail service than any other kind of service that was rendered to the Government and the public on the trains on which the mail was carried.

That estimating passenger cars in the same train as being reasonably filled, the earnings from such cars would be largely in excess of the amount allowed by the Department for service in carrying the mails in the same trains in which the passenger cars were carried, and other facts of kindred character tending to show that the amount allowed by the Department was not a fair and reasonable compensation for the transportation in question, and which counsel for appellant deemed to be important to the determination of the question at issue above stated.

All of the evidence adduced on the trial of this cause in the Court of Claims had relation to the various kinds of service that were rendered by the company to the Government and to the public.

To the compensation received by the company therefor;

To the expense incident to the operation of the road;

To the kinds of service that bear any near resemblance to the transportation of the mails; and

All this was produced and submitted to the Court in obedience to the opinion of this Court on the first apyeal, touching the method or the means by which what is fair and reasonable should be ascertained. This was the rule laid down by this Court for guidance in the future conduct of the case. This rule was followed by the counsel, and the company after having been subjected to great expense and trouble in the production of this evidence, is now confronted with the situation, that instead of the facts in respect of the matters aforesaid having been found by the Court of Claims, whereby the appellant could have the opinion of this Court based upon these facts as to what is fair and reasonable compensation, we have precisely the same result that the Court of Claims reached in the first trial of the case, to wit, in the first trial that Court held that the law under which the Postmaster-General fixed the rate for all the railroads of the country was applicable to this company, and, therefore, appellant should have no more than was accorded to other roads more advantageously situated; while in the last trial, the same result is reached by simply finding that the amount allowed is a fair and reasonable compensation, without giving to this Court a solitary fact by which it is led to that conclusion, and refusing to find the facts which disproved the correctness of such conclusion.

In making this observation we do not wish to be understood as stating or implying that the Court of Claims arbitrarily attempted to sustain by a different method the result it had reached in the first trial. But we do insist that, when the Court said that the amount that had been allowed was a fair and reasonable compensation, it should have given to this Court, as requested, the facts which this Court had already said were pertinent to the inquiry which led it to the conclusion reached. We insist and urge that that Court by refusing to pass upon the specific requests and in making a barren general finding, and refusing to make any other findings, has not dischrged the obligation imposed upon it by the regulation which has been made by this Court; that it is bound by that regulation, when it was requested to do so by the appellant, to find either for or against every proposition of fact so submitted to it for its finding. This Court having already decided that the facts involved in the requests which were presented to the Court of Claims are facts which are material and which bear with greater or less force upon the question in issue, we insist that the materiality of the facts embodied in the requests is not open to serious dispute.

We repeat, that as to the facts so requested to be found, there was no serious controversy in the evidence, and this fact is set forth in the verified petition of the appellant, now being considered. But even if there were discrepancies in the testimony on that subject it was still the duty, as we insist, of the Court of Claims to find either the one way or the other in respect of these several facts, and, having failed to make any finding whatever in respect of them, we respectfully submit that the cause should be remanded to that Court for the purpose of making such findings.

The Practice in such Cases.

In the case of the United States vs. Adams (6 Wall., 104), this Court held that the mode of relief for the failure of the Court of Claims to make the proper findings was by an application to this Court to remand the record to the Court of Claims, with directions to make a new finding of facts, in accordance with the rules on that subject.

See also

U. S. vs. Adams, 9 Wall, 554–9.

In the case of the United States vs. Adams, 9 Wall., 661, another case, this Court held that "the appellants are entitled to have the findings made complete on the points indicated by the interrogatories either affirmatively or negatively;" and that this finding is to be procured by "an order of this Court to be directed to the Court below on motion duly made, requiring that Court to make such return as to the existence or non-existence of such facts."

In the case of Mahan vs. the United States (14 Wall., 109), this Court said, referring to the 5th Rule, that the—

> "purpose of the rule is that when a party has in writing indicated a specific question of fact on which he desired the Court of Claims to make a finding, and the Court has neglected or refused to do so, this Court may be able to determine whether the question is one so necessary to the decision of the case as will send it back for such finding."

The remedy, therefore, in this case lies in an application to remand the case to the Court of Claims for findings on these questions of fact, or to send up the entire record.

What we have above stated, especially in connection with the opinion of this Court in this case in 104 U. S., *supra*, we submit sufficiently indicates that the facts which the Court of Claims were requested to find, and which are now sought to be brought to the attention of this Court, are facts material to the determination of the issue that was thus joined between the claimant (appellant) and defendant (appellee).

We therefore respectfully ask that this case may be remanded as prayed for by the petitioner.

John F. Dillon,
Shellabarger & Wilson,
For the Petitioner.

Sidney Bartlett,
Of Counsel.

THE RULES FOR APPEALS FROM THE COURT OF CLAIMS.

As originally adopted in 1866 (3 Wallace, pp. VII, VIII.), the rules, so far as concerns this case, were as follows :

Rule I.

In all cases hereafter decided in the Court of Claims in which, by the Act of Congress such appeals are allowable, they shall be heard in the Supreme Court upon the following record, and none other :

"1. A transcript of the pleadings in the case, of the final judgment or decree of the Court, and of such interlocutory orders, rulings, judgments and decrees as may be necessary to a proper review of the case.

"2. A finding of the facts in the case by the said Court of Claims, and conclusions of law on said facts on which the Court finds its judgment or decree.

"The finding of the facts and the conclusion of law to be stated separately, and certified to this Court as part of the record.

"The facts so found are to be the ultimate facts or propositions which the evidence shall establish, in the nature of a special verdict, and not the evidence on which these ultimate facts are founded.

See Burr vs Des Moines Company."

Rules 4 and 5, as originally adopted in December Term, 1869 (9 Wallace, VII.), were as follows:

"Rule 4. In all cases in which either party is entitled to appeal to the Supreme Court, the Court of Claims shall make and file their findings of fact and their conclusions of law therein, in open Court, before or at the time they enter their judgment in the case."

"Rule 5. In all cases either party, on or before the hearing of the cause, may submit to the Court a written request to find specifically as to the matter of fact which such party may deem material to the judgment in the case, and if the Court fails or refuses to find in accordance with such prayer, then such prayer and refusal shall be made a part of the record, certified on appeal, to this Court."

The second clause of Rule I. was changed to the present form October 27th, 1873 (17 Wallace, XVII.), and is as follows:

"2. A finding by the Court of Claims of the facts in the case established by the evidence in the nature of a special, but not the evidence establishing them; and a separate statement of the conclusions of law upon said facts, on which the Court founds its judgment and decree. The finding of facts and conclusions of law to be certified to this count as part of the record."

Rule 5 was changed to its present form January 29, 1879 (97 U. S., p. VIII.), as follows:

5. In every such case, each party, at such time, before trial and in such form as the Court may prescribe, shall submit to it a request to find all the facts which the party considers proven and deem material to the due presentation of the case in the findings of fact.

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JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

No. 1034.

THE UNION PACIFIC RAILWAY COMPANY, Appellant,

vs.

THE UNITED STATES.

Supplemental Brief in behalf of the Appellant on the motion to remand the cause to the Court of Claims for further findings.

This application to the court, though necessarily voluminous in its details, is intended to present but a single question.

The 4th and 5th rules of this court regulating appeals from the Court of Claims are as follows:—

"Rule 4. In all cases in which either party is entitled to appeal 'to the Supreme Court, the Court of Claims shall make and file their 'findings of facts and their conclusions of law therein, in open court, 'before or at the time they enter their judgment in the case."

"Rule 5. In every such case, each party, at such time before trial, and in such form as the court may prescribe, shall submit to it a 'request to find all the facts which the party considers proven and 'deems material to the due presentation of the case and the findings "of facts."

I.

The question is, Was this latter rule (framed as it was under a statute, Revised Statutes, title 13, chap. 11, p. 132, giving the full right of appeal "under such regulations as the Supreme Court may direct,") designed to preclude parties making such appeal from any of the advantages which by law attach to appeals, excepting (1) that all facts are to be finally and conclusively determined by the Court of

Claims, (2), but with a right reserved to the parties, for the purpose of protecting their rights of appeal, to request, in writing, that any fact or facts deemed by either party material to the ultimate disposition of the cause be found by the court, and, (3), unless the existence of such fact be negatived, that such request, with the disposition made thereof, shall form part of the record, to the end that whatever may be deemed by the court below to be the value or weight of such fact, the party asking that it may be found may, in the appellate court, have an opportunity to show its bearing and importance upon the legal conclusions in the cause, and thus, and to this limited extent, have preserved to him one of the rights uniformly incident to an appeal.

1st. If this question should be answered in the negative, it would confer on the Court of Claims an omnipotence fatal to the rights of suitors. True, it could not smother the cause by a general finding that the facts establish or negative the claim made. The 1st rule of this court compels the finding of "the facts in the case." This must mean all the facts. *If the court below may select what it deems to be the facts in the case, and exclude from the record all notice of other facts in the prescribed form presented and relied on by the aggrieved party, it will have an absolute control of the fortunes of litigants*, and, what is most material, it will, by such exclusion, pass finally upon the law, without being subject to revision, since such exclusion must be deemed not arbitrary, but founded upon some principle of law, even if it rests upon the question of immateriality.

2d. Before calling attention to the terms of the two rules the construction of which is the object of this application, and laying aside, for the present, the question whether that of the Court of Claims can be maintained, it may be proper to state that this application does not involve any inquiry as to the form of the several prayers for findings made by the appellant, nor any necessity for reference thereto; since as it will be seen hereafter, the ground on which the Court of Claims refused to make them part of the record is not that they fail in certainty or are argumentative. The ruling as made, it will be seen by necessary implication, admits that the sole ground of refusal to make these requests part of the record was that the 5th rule, as it now stands, does not, for the reasons stated, require either that such requests or the disposition thereof should appear in the record.

3d. The scope and purpose of each and all of the regulations prescribed by this court may properly be first examined to find if it was designed to abridge the right of appeal given by the statute, any further than to require that the facts and all the facts deemed by either party material should be conclusively found by the court below, and then, together with the disposition of the same, be made part of the record.

The first of these rules requires that "such interlocutory "orders, *rulings*, judgments, and decrees as may be necessary to a "*proper review of the case*" shall form part of the record. The 5th rule provides that each party *shall* submit a request to find all the facts which that party considers proven and deems material to the due *presentation of the case.*

Now, a request of the above character, it is submitted, requires a ruling of some kind. If it is to be ignored, as was done in this case, it cannot be silently ignored. To give effect to the second rule above quoted, and to place before the appellate tribunal all of the proceedings "*necessary to a proper review of the case*," the Court of Claims was bound to place on the record both the request and the ground on which it ignored the same. *This duty it could not escape by undertaking to silently determine for itself what facts were necessary to a "proper review of the case*," and thus escape any ruling. If it could do so, then, the finding or not finding all the facts of a case would be wholly at its discretion, and the value of any appeal be lost.

4th. The general purpose of the rules is, we submit, also settled by the provision of the 5th rule, which, we claim, requires that there be placed on the record every fact by either party deemed material, and not merely such facts as may be considered material by the Court of Claims; so that the ruling of that Court thereon shall form part of the record.

Thus, the rule provides that each party *shall* (not may) submit a request to find all the facts which the party deems material to the "*due presentation of the case, in the findings* OF FACT." Presentation to what tribunal? Clearly to the appellate tribunal, since otherwise it would be a mere direction that the parties *shall* file a brief. But this is not all. These facts are to be such as the party considers material to the "due presentation of the case *in the findings of facts*" to be made by the court; that is to say, in the findings of fact required by the second rule for the purposes of appeal; and there can, we submit, be no other construction than that these requests are *to form part of those findings* of facts material to the "*due presentation of the case*" in the appellate tribunal.

5th. It is submitted that the 5th rule is open to but one of two constructions. It either means to *require* parties to file a brief to be regarded or disregarded by the court, which would seem to be a superfluous provision, or it is a compulsory direction upon parties (unless they are willing to rely on the court to make the findings of all facts material to their interests) to present to the court a request for specific findings, at the risk, if they omit so to do, that the findings of the court will not embrace these material facts, and thus their effect upon their rights in the appellate court be entirely lost. The words of the rule are not permissive,—they are mandatory, "*shall.*" It would seem, therefore, impossible that such request for special findings should be made, and yet, that they should, when made, afford no protection to the party making them, either in a "*proper review of the case,*" or the "due presentation of the case in the findings of fact before the appellate tribunal."

The rule declares the findings of facts by the Court of Claims are to be in the nature of a special verdict. What special verdict was ever framed or allowed by any court which omitted what one of the parties claimed to be a material fact, or, if such omission be directed by the court, then that such direction was not itself the subject of exception?

The effect of the change of phraseology in the 5th rule, made by the court after its first adoption, and the purpose and effect of that change, will be discussed hereafter, when we come to consider the judgment of the Court of Claims which contains the ground on which that court refused to make appellant's request for findings a part of the record.

II.

Having thus submitted to the court appellant's view of the purpose and construction of the 5th rule, the judgment of the Court of Claims as to that purpose and construction is next to be examined.

Of course, that judgment is not to be found in the record: having determined not to embody the appellant's requests for findings in that record, and consequently to make no rulings thereunder, they are excluded. The court, in its findings of fact, disposes of the case by a declaration (16th Finding of Fact, Record, p. 23), thus: "The amount "allowed and retained by the Treasury Department for the transportation of the mails, as aforesaid, is a fair and reasonable compensation "for the service, and not in excess of the rates paid by private parties "for the same kind of service.

In its conclusions of law (Record, p. 34), it declares that "the court "has found as a fact that the rates allowed by the Treasury Department "are fair and reasonable, and not in excess of rates paid by private "parties for the same kind of service. No question of law arises on "that finding."

These findings are therefore, in effect, a general verdict. They do not declare whether the court found that appellant's requests for findings of facts had no support in the evidence, whether they were vicious in form, or held by the court to be upon legal principles immaterial to the issue. We must resort, therefore, to the rulings of the court upon two several applications of appellant to have its requests for findings embodied in the record, as required by the first rule.

1st. The first of these applications, filed June 1, 1885, immediately after the findings of the court became known to the parties, is hereto annexed, marked "B." The second application, September 14, following, is not to be found in the record, but is annexed to plaintiff's present motion (Exhibit "A," p. 35); and although a written opinion was filed in the court, and was thus clearly a "*ruling*" under the first rule, and ought to form part of the record, yet it is not to be found there.

The order of the court on the first of the above petitions declares, (as if it bore upon the principle at stake), that *there are 34 printed pages* of requests in the cause; that they were each and all thoroughly examined and considered by the court, and were passed upon in its findings of fact, and that finding contains all the facts established by the evidence and "*deemed*" material to the due presentation of the case.

Deemed material by whom? The appellant had, under the rule, declared that his prayers for findings were material to the due presentation of his case to this court. Can the Court of Claims rule that they were not material, exclude them from the record, and thus withdraw them from the judgment of the appellate tribunal?

2d. The opinion that follows the order declares the grounds of that order to be,—

That, after several years' experience, rule 5 proved in practice to be attended with great difficulties and embarrassments to that court.

These difficulties and embarrassments consisted in the fact, that the requests were so diffuse in language, and so interspersed with irrelevant matter, evidence, and propositions of law, that a satisfactory finding or ruling on each one could not well be made, and, if made, its bearing on the case * * * * was difficult to ascertain.

It next declares that, "*accordingly*," in January, 1879, this court changed the rule, by striking out the provision that in case of refusal to find in accordance with the prayers, those prayers and refusals shall form part of the record; and the court proceeds to declare its view of the effect of that change, as will be noticed hereafter.

Now, with no other modification of the rule declaring its purpose than the omission of the provision referred to, and leaving the rule in other respects unchanged, nothing short of some adjudication can induce the appellant to assume that, looking to the grave consequences upon the suitor's right of appeal, the purpose of the change was "accordingly," (that is to say, for the reason set out by the Court of Claims,) made by this court.

Such purpose ascribes to this court the intent that merely to remedy diffusiveness in prayers for findings, or their being charged with irrelevant matter, or their mixing propositions of law and fact, for all which a complete remedy exists, and is in constant use, as in case of exceptions (namely, a rejection of the prayers for these defects), the safeguard of requiring all proceedings to be of record should be abolished, and the Court of Claims left to find; notwithstanding the prayer of the party, such fact and such facts only as that court shall deem material to his rights, and thus shut off all remedy by appeal.

Of course, this argument is addressed to the court that made and changed the rule, and which must know its purpose; but it is submitted, that if, in fair construction, that purpose is not carried into effect by the rule, then, the rights of the suitor are to be settled by that fair construction, and in this view, appellant again asks how it is possible to hold that a peremptory request that prayers for findings of fact deemed by the suitor "material to the due presentation of the case in the findings of fact," can be deemed a mere direction to file a brief.

3d. Still further, the change in the 5th rule strikes out the words "material to a judgment in the case," which might possibly be construed as meaning material to the judgment of the Court of Claims, and inserts in lieu thereof the words "material to the due presentation of the case *in the findings of fact.*"

This change made the provision of the old rule requiring the prayers for findings, if refused, to form part of the record, merely a surplusage and wholly immaterial. A prayer that certain facts be found as a material part of the findings for the judgment of the court below has all the qualities of a plea, and of course forms part of the record; but, perhaps, what is conclusive upon this question of effect and purpose of the change of the rule is the declaration of the court in the Armstrong 98, U. S. R., p. 444: "The rule was changed somewhat in form, *but not in substance.*"

4th. It may be proper to refer here to what the Court of Claims, in its judgment above referred to, declares to be its practice under the rule. "The practice of the court is to give to the requests of the parties the "fullest consideration and the most careful scrutiny, without finding or "ruling upon each one separately, to make up an accurate and connected finding in its own language, in such way as to cover every "*material fact* asked for on either side."

This, of course, leaves the Court of Claims to select and determine what is "every material fact asked for by either side," without any possible redress by appeal for omissions which may deeply prejudice the rights of a party.

The ruling of the Court of Claims upon the renewed petition of the appellant that its requests for findings might form part of the record requires but a brief discussion.

The declaration, in its judgment (see p. 37 of plaintiff's motion in this case), is, "that requests for findings of fact submitted by the "parties before trial are for the assistance of the court, and not for "the purpose of laying a foundation for review on appeal. They no "more form part of the record for appeal than do briefs and printed "arguments."

The appellant's view of the unsoundness of such a construction of the 5th rule has already been laid before the court.

But the more formidable part of that judgment, which is addressed to the fears of an overburdened court, is as follows: —

"In our opinion, the Supreme Court would not undertake to "compare the findings of this court with the voluminous requests of the "parties, embracing more than eighty printed pages, for the purpose of "determining whether or not we had covered the whole ground, and "therefore would not sanction the sending up of such a mass of useless "matter."

It is submitted that these supposed consequences have no foundation. No scrutiny by the court to find, in case requests are made part of the record, whether the Court of Claims had covered the whole ground, would be at all requisite. All that this court would have to do would be to find, Have any requests been improperly rejected? and, next, if not rejected, have they been allowed their due weight upon the proper legal conclusions in the cause?

S. BARTLETT,

For Appellant.

B.

COURT OF CLAIMS.

Nos. 14,389, 12,515, and 11,901.

THE UNION PACIFIC RAILWAY COMPANY v. THE UNITED STATES.

MOTION OF CLAIMANT.

The claimant, the Union Pacific Railroad Company and the Union Pacific Railway Company, now comes and states to the court that it deems it essential to the right determination of the matters in issue in the above entitled cases that the court should pass upon and find what is established by the evidence embodied in the record in such cases regarding the several and respective requests for findings of fact, as set forth in the requests for findings of fact heretofore filed in this case now hereto annexed and marked A and B, and made part of this motion; and therefore hereby again presents and files in the cases the said requests for such findings, and moves the court to find the same severally and respectively; or, in the event that the court should reach the conclusion that it ought to refuse such requests for such respective and several findings, then that the court will enter of record such refusal to so find as to each of the requests as to which the court shall so refuse to find.

JOHN F. DILLON,
SHELLABARGER & WILSON,
Attorneys for Claimants.

ORDER OF COURT.

The foregoing motion, to which are annexed 48 printed pages of requests for findings of fact, filed after the court had completed its findings and made the same known to the parties, is overruled on the ground that the court has fully complied with the rules of the Supreme Court in relation to appeals (Rules 4 and 5), in the findings already made, and is not bound to rule specifically on each request of the parties. Precisely the same requests were filed by the claimant before the trial of the case as required by Rule V. of the Supreme Court and the rules of this court, now numbered 52, 53 (20 C. Cls., XIX). In connection with 34 printed pages of request filed by the defendants, they were each and all thoroughly examined and considered by the court, and were passed upon in its findings, which contain all the facts proven and deemed material to the due presentation of the case.

OPINION.

RICHARDSON, C. J., delivered the opinion of the court:

Rules IV. and V. of the Supreme Court, in relation to appeals from the Court of Claims, are as follows: —

RULE IV.

In all cases in which either party is entitled to appeal to the Supreme Court, the Court of Claims shall make and file their findings of facts and their conclusions of law therein, in open court, before or at the time they enter judgment in the case.

RULE V.

In every such case, each party, at such time before trial, and in such form as the court may prescribe, shall submit to it a request to find all the facts which the party considers proven and deems material to the due presentation of the case in the findings of facts.

Formerly the following was Rule V., which is no longer in force: —

> In all such cases either party, on or before the hearing of the cause, may submit to the court a written request to find specifically as to any matter of fact which such party may deem material to the judgment in the case; and if the court fails or refuses to find in accordance with such prayer, then such prayer and refusal shall be made a part of the record certified on the appeal to this court.

After several year's trial, experience proved that the practice under the old Rule V. led to great difficulties and embarrassments without contributing in any degree to the better presentation of the case. The requests for findings of fact filed by the parties were often so diffuse in language, and so interpersed with irrelevant matter, evidence and propositions of law either directly or inferentially, that a satisfactory ruling upon each one could not well be made, and, if made, its bearing upon the case, as presented by the findings of the court all connected together and drawn with reference to each other, was difficult to ascertain.

Accordingly the Supreme Court changed that rule several years ago. Under the rules as they now stand, the practice is to give to the requests of the parties the fullest consideration and the most careful scrutiny, and, without ruling upon each one separately, the court makes up accurate findings in such way as to cover every material fact asked for on either side, and to present to the Supreme Court on appeal a clear and concise statement of the case upon which questions of law arising may be there reviewed. Such a course we believe has been eminently satisfactory. The present motion is the first of the kind that has been made since the adoption of the existing rule of the Supreme Court, and even here no specific fact is requested, but only a specific ruling on each of the numerous requests for findings heretofore made by the claimant.

The motion is overruled.

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JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

THE UNION PACIFIC RAILWAY, appellant,
against
THE UNITED STATES, appellee.
No. 1034.

BRIEF FOR THE UNITED STATES ON THE MOTION TO REMAND.

In the Supreme Court of the United States.

THE UNION PACIFIC RAILWAY, APPELLANT,
against
THE UNITED STATES, APPELLEE.
No. 1034.

BRIEF FOR THE UNITED STATES ON THE MOTION TO REMAND.

The motion to remand involves a simple point of practice; but the determination of that point is a matter of grave importance in both this court and the Court of Claims.

By Revised Statutes, sections 707 and 708, appeals to the Supreme Court shall be allowed under such regulations as the Supreme Court may direct.

Those regulations have been directed and modified from time to time by this court, until a complete system has been established. They are as follows:

RULE I.

> In all cases hereafter decided in the Court of Claims, in which, by the act of Congress, such appeals are allowable, they shall be heard in the Supreme Court upon the following record, and none other:
>
> 1. A transcript of the pleadings in the case, of the

In the Supreme Court of the United States.

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against
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RULE I.

> In all cases hereafter decided in the Court of Claims, in which, by the act of Congress, such appeals are allowable, they shall be heard in the Supreme Court upon the following record, and none other:
>
> 1. A transcript of the pleadings in the case, of the

final judgment or decree of the court, and of such interlocutory orders, rulings, judgments, and decrees as may be necessary to a proper view of the case.

2. A finding by the Court of Claims of the facts in the case, established by the evidence, in the nature of a special verdict, but not the evidence establishing them, and a separate statement of the conclusions of law upon said facts on which the court founds its judgment or decree. The finding of facts and conclusions of law to be certified to this court as part of the record.

* * * * * * *

RULE III.

In all cases an order of allowance of appeal by the Court of Claims, or the chief justice thereof in vacation, is essential, and the limitation of time for granting such appeal shall cease to run from the time an application is made for the allowance of appeal.

RULE IV.

In all cases in which either party is entitled to appeal to the Supreme Court, the Court of Claims shall make and file their findings of facts and their conclusions of law therein, in open court, before or at the time they enter judgment in the case.

RULE V.

In every such case each party, at such time before trial, and in such form as the court may prescribe, shall submit to it a request to find all the facts which the party considers proven and deems material to the due presentation of the case in the finding of facts.

The complaint of the appellant railway in this motion is that it was denied specific findings upon certain requests presented to the court below to which it was entitled by a fair interpretation of these rules and regulations. Two applications were made to that court to pass upon a large number of requests and were denied.

Mr. Chief Justice Richardson, referring to a former rule (9 Wall., VII) which had been changed, said:

> After several years' trial experience proved that the practice under the old Rule V led to great difficulties and embarrassments, without contributing in any degree to the better presentation of the case. The requests for findings of fact filed by the parties were often so diffuse in language, and so interspersed with irrelevant matter, *evidence*, and propositions of law either directly or inferentially, that a satisfactory finding or ruling upon each one separately could not well be made, and, if made, its bearing upon the case, as presented by the findings of the court, drawn with reference to each other and all properly connected was difficult to ascertain.
>
> Accordingly the Supreme Court changed the rule several years ago (January 29, 1879). As it now stands this court is not required to find specifically and separately as to all matters of fact in the form requested by the parties. It must make "a finding of the facts in the case established by the evidence, in the nature of a special verdict," to constitute part of the record upon which the case may be reviewed by the Supreme Court on appeal as prescribed by the second paragraph of the first rule on the subject; and that has been done in this case.
>
> The requests required to be submittted by the parties are for the assistance of the court in making up its findings, and not for the purpose of obtaining

> specific rulings on each one separately in the form by them presented.
>
> The practice of the court is to give to the requests of the parties the fullest consideration and the most careful scrutiny, and, without finding or ruling upon each one separately, to make up an accurate and connected finding, in its own language, in such way as to cover every material fact asked for on either side, and to present to the Supreme Court on appeal a clear and concise statement of the case upon which questions of law may be there reviewed.
>
> * * * * * * *
>
> In the present case the court made and filed, at the time of entering judgment, "a finding of the facts in the case established by the evidence, in the nature of a special verdict," and it will be certified as part of the record required by the second paragraph of the above rule.
>
> The requests for findings of fact submitted by the parties before trial are for the assistance of the court, and not for the purpose of laying a foundation for review on appeal. They no more form part of the record for appeal than do the briefs and printed arguments. Nor can the parties make them part of the record by annexing them to a motion requesting the court to find separately and specifically as to each one. Such a motion adds nothing to the requests previously filed, but merely reviews them, and the court was bound to do no more upon the motion than it was required to do upon the request when first submitted, and that was to make "a finding of the facts established by the evidence," which was done, and the same will be embraced in the transcript of the record. (20 C. Cls., 510–514.)

This seems to be a fair and reasonable construction of these regulations. The second paragraph of Rule I, in providing for a finding of facts, *in the nature* of a special verdict, succinctly defines what such finding shall be, which complies with all the requirements of a special verdict at common law. (Bacon's Ab., Tit. Verdict. (D.); 3 Black's Com., 377; Burr *v.* Des Moines Co., 1 Wall., 102.)

Under the peculiar practice obtaining in the Court of Claims, there being no intervention of a jury, their findings being special, are in the nature of a special verdict. And it would be a strange doctrine that, under its jurisdiction and practice, the entire discretion of the court could be limited, fettered, or controlled by requests for findings of fact by suitors.

The action of the court below seems to come completely within the decisions of this court. Parties will not be permitted to bring the evidence here, even by an able and ingenious use of the provisions of Rule IV. (U. S. *v.* Pugh, 99 U. S., 265; Sun Mutual Ins. Co. *v.* Ocean Ins. Co., 107 U. S., 503; De Groot *v.* The U. S., 5 Wall. 419.)

Respectfully,

ROBERT A. HOWARD,
Assistant Attorney-General.

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CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1885.

THE UNION PACIFIC RAILWAY, appellant,
vs.
THE UNITED STATES, APPELLEE.
No. 1034.

BRIEF FOR THE UNITED STATES ON THE MOTION TO REMAND.

In the Supreme Court of the United States

OCTOBER TERM, 1885.

THE UNION PACIFIC RAILWAY, appellant, *vs.* THE UNITED STATES, APPELLEE. } No. 1034.

BRIEF FOR THE UNITED STATES ON THE MOTION TO REMAND.

The amendment to petition and motion of appellant to remand concludes with the prayer:

> That an order may be directed to the said Court of Claims to send up to this court the entire record in said case, including the interlocutory rulings and all the evidence on which the case was heard, or, if, in the judgment of this court, this order cannot be made, then that the said last-named court shall specifically pass upon, affirmatively or negatively, each of said requests, or make a finding of facts on the subject embraced in each of said requests, and that the said court shall be directed to incorporate in the record in this case the said stipulation hereinbefore set forth, and the said letter hereinbefore referred to, and in the original petition set forth as hereinbefore averred, and for such other and further order as this court shall deem just and proper and to justice shall appertain.

The grant of this prayer would not only involve a new departure, so far as the practice of this court and the Court of Claims is concerned, but would amount virtually to an abrogation of the rules which have been adopted by this court regulating appeals from the Court of Claims in accordance with the Revised Statutes, sections 707 and 708. In the case of De Groot *vs.* The United States (5 Wallace, p. 427), Mr. Justice Miller, speaking for the court, says:

> We take this occasion to say we shall adhere strictly to the rules we have prescribed, and shall regard no other matter in the transcript sent to us than what they allow, and that in proper cases the cost of the useless part of the record shall be taxed against the party who brings it here.

In United States *vs.* Adams (6 Wallace), the Supreme Court says:

> The rule above referred to was made for the protection of this court, as well as to secure a finding of facts by the tribunal which must of necessity inquire into them fully, and which, having ample time and being otherwise in every way competent, may be relied on to find them truly.

Again, in the same case, after stating that the existence of the fraud or mistake set up in the pleading is one of the ultimate facts to which the law of the case must be applied in rendering a judgment, the court says:

> This court does not propose to go behind the finding of the Court of Claims on that subject. To do so would require an examination of evidence and a comparison of the weight to be attached to each separate piece of testimony, and the drawing of inferences

> from the whole which is the peculiar province of a jury, and which, by our rule, we intend to exclude from the consideration of this court by making such finding by the Court of Claims conclusive.

As to the first part of appellant's motion touching the interlocutory rulings, we submit there is nothing to show that they are necessary to a proper review of the case here; and as to the evidence, we submit that the motion of the appellant is in direct conflict with second paragraph of rule one, which provides that a finding by the Court of Claims of the facts in the case, established by the evidence in the nature of a special verdict, but not the evidence establishing them, shall be certified to this court as part of the record. Ever since the adoption of these rules it has been a well-settled practice in this court not to examine the evidence on which the finding of facts has been made by the Court of Claims.

In regard to the second branch of appellant's motion, "that the case be remanded to the Court of Claims with an order that said court shall specifically pass upon, affirmatively or negatively, each of its said requests, and make a finding of facts on the subject embraced in them," we submit that this cannot be done without ignoring entirely the fourth and fifth rules of the court. The Court of Claims are required by rule four to make and file *their* findings of facts and *their* conclusions of law therein in open court before or at the time they enter judgment in the case. That requirement has been complied with by the Court of Claims in this case.

The court is not bound under the rule to find specifically and separately on each request of the parties. The court has examined and passed upon each one of the requests, but its finding has been made in its own language, and not in the language of the appellant. It has made a finding of the facts in the case established by the evidence in the nature of a special verdict, and those facts have been certified to this court as part of the record. In the language of the Chief Justice of the Court of Claims:

> The requests for findings of facts submitted by the parties before trial are for the assistance of the court, and not for the purpose of laying a foundation for review on appeal. They no more form a part of the record for appeal than do the briefs and printed arguments. Nor can the parties make them part of the record by annexing them to a motion requesting the court to find separately and specifically as to each one. Such a motion adds nothing to the requests previously filed, but merely renews them; and the court was bound to do no more upon the motion than it was required to do upon the request when first submitted, and that was to make a finding of the facts established by the evidence, which was done. (20th Court of Claims Reports, 514.)

If the appellant's prayer should be granted, and a specific finding of facts is required upon each one of the requests, the result will be that this court will have before it on appeal two series of findings, which must inevitably lead to confusion and uncertainty. How could this court undertake to balance these admitted facts? Suppose this court should be of opinion that there is inconsistency between the specific facts which the Court of Claims is now asked to find, and the ultimate fact which it has already found, to wit, that the amounts allowed and retained by the Treasury Department for transportation of mails as aforesaid are a fair and reasonable compensation for the service, and not in excess of the rates paid by private parties for the same kind of service, how is that inconsistency to be reconciled? Will this court undertake to examine the evidence in order to ascertain whether the Court of Claims was right as to the ultimate fact referred to, or right as to the specific facts which it is now asked to find? We insist that it could not do so without an abrogation of the rules referred to and the adoption of some new regulation governing this particular motion.

The court will observe that claimant's requests for findings are very voluminous indeed, and cover a large number of printed pages of its petition. How can it assist this court in applying the law to the ultimate fact found by the Court of Claims in its sixteenth finding to be informed as to the weight of the mails carried between February 1, 1876, and December 31, 1882, or that during the years 1876, 1877, 1878, 1879, 1880, and 1881, at least one mail car started each day from Council Bluffs, and one from Ogden, or that the Australian mail was a part of the entire mail transported and enters into the average daily weight, or that in 1869, on the completion of its road, the claimant company resolved, on the motion of a government director, to do its own express business, and so on as to all the other requests for specific findings?

The matters referred to in these requests were doubtless constituent elements in the problem of estimating the amount of fair and reasonable rates of compensation, and it is fair to presume that the Court of Claims considered everything material in enabling them to find the ultimate fact, to wit, that "the amounts allowed and retained by the Treasury Department for transportation of mails as aforesaid are a fair and reasonable compensation for the service, and not in excess of the rates paid by private parties for the same kind of service." That was the real fact in question, and we apprehend that this court will not undertake to give directions to the Court of Claims as to how it should proceed to make up its finding on matters of fact to be certified to this court in order that it may decide upon the questions of law involved. (See United States *vs.* Adams, 9 Wallace, p. 663.)

While rule five provides that each party shall submit to the Court of Claims a request to find all the facts which the party considers proven and deems material to the due presentation of the case, our understanding is that when the court finds the facts they must be such facts as the court shall deem material; in other words, it was never supposed that the court must find the fact to be as the party claimed it, and if they did not, that he could for that reason bring the whole testimony here to show that he was right. (See Mahan *vs.* The United States, 14 Wallace, 112.)

As to the prayer of the appellant that the Court of Claims shall be directed to incorporate in the record the stipulation set forth in its amended petition, we submit that said stipulation was not considered or used in the second trial, from which the appeal now pending in this court was taken. The record will show that this case was commenced by three distinct petitions, as follows:

The Union Pacific Railway Company *vs.* The United States, No. 11901, petition filed January 8, 1878.

The Union Pacific Railway Company *vs.* The United States, No. 12518, petition filed April 14, 1881.

The Union Pacific Railway Company *vs.* The United States, No. 14389, petition filed June 6, 1884.

On December 8, 1884, the Court of Claims made the following order:

> It is ordered by the court, the parties thereto consenting, that the above-entitled causes be, and the same are hereby, consolidated, and that they be hereafter proceeded with as one cause under No. 14389.

An amended petition was then filed as a substitute for all previous petitions. The stipulation referred to was filed in relation to the second one of the four petitions in the case. The case was not tried upon that petition, nor in the manner contemplated by the stipulation. More than three years after that stipulation was filed, a third petition was filed, extending and varying the claims on both sides. Six months later the claimant filed a new petition (a fourth) covering all the claims in the three preceding petitions. This became a new case, and was so tried. Each party presented new requests for findings, briefs, and arguments, wholly independent of the former proceedings. Neither party relied upon the stipulation. It is not referred to in the requests of either party, or in the arguments, and was not called to the attention of the court. They proceeded *de novo* upon the amended petition.

If the claimant relied upon the stipulation, it should have done so in the court below, and not in this court for the first time. It is too late to introduce it now, after it had been practically waived by both parties. The requests for findings by both parties show that this stipulation was ignored, and the presentation of the case on each side was inconsistent with reliance upon the said stipulation.

Upon the whole case we submit that the action of the Court of Claims has been in strict accordance with the rules and the decisions of this court.

Respectfully,

JOHN GOODE,
Solicitor-General.

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CLERK.

IN THE SUPREME COURT OF THE UNITED STATES.

THE UNION PACIFIC RAILWAY COMPANY, *Appellant,* *vs.* **THE UNITED STATES.**	**No. 1034.** OCTOBER TERM, 1885. ***Appeal from the Court of Claims.***

Petition of the Appellant Railway Company for a Certiorari to the Court of Claims and for other relief.

JOHN F. DILLON

AND

J. M. WILSON,

Attorneys for Appellant.

C. G. BURGOYNE'S "Quick" Print, 146, 148 & 150 Centre St., N. Y.

IN THE

SUPREME COURT OF THE UNITED STATES.

UNION PACIFIC RAILWAY COMPANY,
Appellant,

AGAINST

THE UNITED STATES,
Appellee.

No. 1034.

Petition for Certiorari, &c., &c.

This cause was originally commenced in the Court of Claims by three distinct petitions, as stated in the record of this cause on file herein, page 1. One of said suits was number 12,515. Judgment having been given by the Court of Claims in this cause against the company, the company appealed therefrom in the Supreme Court, the opinion on which appeal is reported in 104 U. S. Reports, 662 (*Union Pacific Railroad Company vs. The United States*). This Court reversed the judgment of the Court of Claims for reasons assigned in the opinion, and ordered the cause to be remanded to the Court of Claims, with instructions to proceed therein in conformity with the opinion of the Supreme Court. This cause, No. 12,515, and the other two, were consolidated on the 8th of December, 1884, and the amended petition filed as a substitute for the previous petitions (Record, p. 1). In the petition originally filed in the said cause No. 12,515, the Union Pacific Company alleged that on the first day of September, 1876,

> "it gave notice to the Postmaster-General of the United States that from and after the first day of February, preceding (1876), your petitioner would require from the Government compensation for the transportation of mails at fair and reasonable rates, and at rates paid by private parties for the same kind of service; and your petitioner hereto annexes a copy of said notice to the Post-office Department (marked Exhibit B), and asks that the same may be taken and deemed to be a part of its petition."

Said Exhibit B annexed to the said petition was a letter of Mr. SIDNEY DILLON, the President of the Union Pacific Railroad Company, to the Honorable J. N. TYNER, Postmaster-General, which is printed in the Petition of the appellant Railway Company recently filed herein, that this cause be remanded to the Court of Claims for a more specific finding of facts, on pages 23 and 24 of said Petition. A copy of the said letter is also hereto annexed, marked Exhibit B.

In the Amended Petition in this cause and on which it was tried below, it was alleged as follows:

> "Claimant avers that the several amounts charged in said exhibits for the services so performed were the rates therefor *which it had determined and fixed*, both as respects the Government and the public, and of which the Government and the several departments were duly notified, which rates claimant avers were fair and reasonable and not exceeding the amounts paid by private parties for the same kind of service."
>
> Record, page 3, paragraph VII.

In the said cause, No. 12,515, prior to the first trial thereof in the Court of Claims, the parties submitted the cause to the Court for judgment upon certain stipulated or agreed facts, which facts thus stipulated are set forth at large in the amended petition and motion recently filed in this Court for a further finding of facts by the Court of Claims, at pages 6 to 11 inclusive; and the same is hereby referred to and made part of this petition.

The Court of Claims in said cause, No. 12,515, made a finding of facts at the first trial thereof as follows:

" This case having been heard before the Court of Claims the Court upon the evidence finds the facts to be as follows:

I.

" *It was admitted upon the trial, and the Court finds the facts to be, that the notice entitled Exhibit B, annexed to and forming part of the petition, dated New York, September 1, 1876, was duly given by the claimant to the Postmaster-General.*

II.

"The case was submitted and heard upon the following agreed statement of facts, which the Court adopts and finds as its finding of facts."

(Here follows the agreed statement of facts above referred to, all of which will appear by reference to the record of the said cause No. 12,515, now remaining in this Court).

The effect of this letter was considered by the Court of Claims in its opinion in the said case No. 12,515.

The Court observed (see record thereof in this Court, page 10):

> "In coming to this conclusion we have not overlooked the fact that on the 1st of September, 1876, the President of the company gave to the Postmaster-General clear and explicit notice that the claimant intended to charge the Government express car rates for the running of postal cars. Such notice was eminently proper to put the Postmaster-General on his guard as to the future use of postal cars, and to negative the presumption that the claimant would thereafter continue to acquiesce in the existing rates."

This letter was referred to in the opinion of this Court on the appeal (104 U. S., 666) as "the protest of the company in which it claimed the benefit of its contract as still in force;" and (page 667) where it is stated "that appellant insisted upon the adoption of the rates charged by it to private parties."

This agreed statement of facts and the said letter, Exhibit B, were referred to by counsel on both sides in the Court below on the trial of the consolidated cause as one of the undisputed facts in the cause. Pursuant to the said letter, claimant insisted upon being paid in accordance therewith; but the Postmaster-General continued to allow compensation only at the rates fixed by sections 4001, 4002 and 4004 of the Revised Statutes and the amendments thereof; and pursuant thereto and against the protest of the company as to its sufficiency, made the allowance referred to by the Court of Claims in its sixteenth finding (see present Record, page 23), which finding is as follows:

> "XVI. The amounts allowed and retained by the Treasury Department for transportation of mails as aforesaid are a fair and reasonable compensation for

the service and not in excess of the rates paid by private parties for the same kind of service."

Referring to this finding, the Court of Claims in its opinion in this cause (Record, page 34), says:

> "In this branch of the case the principal controversy was as to the amount of compensation to which the claimant was entitled for carrying the mails over the aided portions of its road under the Act of 1862. The Treasury Department in making up the account for carrying the mails has allowed to the claimant the maximum rates established by law for the same kind of service on non-aided railroads, less the reduction made and fines imposed by the Postmaster-General. The claimant demands a much greater rate, and the Assistant Attorney-General contends for a much less rate."
>
> "The Court has found as a fact that the rates allowed by the Treasury Department are fair and reasonable, and not in excess of the rates paid by private parties for the same kind of service. No question of law arises on that finding."

No other part of the findings in the record of this appeal relates to the claim of the company for postal compensation. Petitioner alleges, as it is advised, that in the Court of Claims there was no evidence that the amount thus allowed was fair and reasonable, and that there was no evidence in that Court that the amount fixed and charged by the company was unfair and unreasonable, or in excess of the amounts charged by it to private parties for similar or like services. Nor was there any evidence before the Court of Claims of any kind or description relating to or showing the principles or elements on which the maximum rates established by law for the same kind of service by non-aided roads were fixed.

Your petitioner shows that by the act of Congress the company has power to fix rates to the public and to all its customers, including the United States. That such power is not only implied in the power (section 1 of the Act of July 1, 1862) to construct and enjoy a continuous railroad, but also in sections 6 and 18 of said act, which speaks of "rates of compensation," "rates of fare," &c. Of which power to fix rates, the company has been in the unquestioned exercise from the first. That the company's power in this respect extends to fixing rates for Government service with the single limitation that such rates must be fair and reasonable, which is simply the common law limitation, and not to exceed the rates paid by private parties for the same kind of service. The company accordingly fixed its rates by said letter of its President of September 1st, 1876, viz., which "were less than the rates allowed by the United States to the company from 1870 to 1874" (see Exhibit B hereto attached).

Your petitioner shows and submits that the 16th finding of fact by the Court of Claims is not a finding of facts in the nature of a special verdict; and is not a finding of any facts whatever on the issue made by the pleadings, to wit, that the rates fixed by the said letter of September 1st, 1876, were fair and reasonable and not in excess of the rates paid by private parties for the same kind of service. It is, therefore, respectfully submitted that the real issue in the case is not determined by the findings of fact or the judgment of the Court of Claims, which Court treated the issue as being simply on a *quantum meruit.*

Petitioner files as part of the record on this appeal the said findings of fact in the cause No. 12,515, duly certified.

Prayer. Your petitioner prays as follows: That the said findings of fact in No. 12,515, and, particularly, the said letter of September 1st, 1876, be ordered to be made and considered a part of the record on this appeal; and to that end, if necessary, prays, under Rule 14 of this Court, that a writ of *certiorari* issue to the Court of Claims requiring it to transmit to this Court the record and the said findings of fact in No. 12,515, and the said letter of September 1st, 1876, to which end it prays, under the 30th Rule of this Court, that the appellant's motion, heretofore filed at this term for a further finding of facts by the Court of Claims, and the order of this Court entered thereon, may be reheard, if such rehearing shall be necessary, in order to get said letter of September 1st, 1876, before this Court as part of the record on this appeal.

THE UNION PACIFIC RAILWAY COMPANY.
By JOHN F. DILLON and
J. M. WILSON,
Its Attorneys.

JOHN F. DILLON, being duly sworn, deposes and says that he is the counsel for the Appellant Railway Company. That he has read and knows the contents of the foregoing Petition, and that the matters therein stated upon the knowledge of this affiant are true, and all of the other matters therein stated he believes to be true.

JOHN F. DILLON.

Sworn to before me
this day of
January, 1886.

W. W. COTTON,
Notary Public,
Kings County,
N. Y.

Exhibit B.

UNION PACIFIC RAILROAD COMPANY.
PRESIDENT'S OFFICE, 23 NASSAU ST.

P. O. Box 5446. SIDNEY DILLON, President.

NEW YORK, Sept. 1, 1876.

HON. J. N. TYNER, Postmaster-General:

SIR—By a recent weighing of the mails transported by the company for your Department, made in February last, the average daily weight for a period of thirty consecutive days was fifteen thousand pounds.

Under contract of the Government (see section 6 of the Act of 1862), we are required to perform this service at rates of compensation not to exceed the amount to be paid by private parties for the same kind of service.

The transportation of express matter is performed on the same trains, viz., passenger trains, and is assumed to be the same kind of service.

We have accordingly had a careful computation made of the compensation received for express service, and computing the mail service on the basis indicated, gives the annual sum of $596,775 or $49,731.25 per month.

Dating from February 1st, 1876, we shall charge the Government this sum monthly for mail transportation, in addition to the fares of such employees and mail agents as the Government shall send on our trains.

The company believe the Postmaster-General will concede the correctness of the rule we have adopted as to similar kinds of service, inasmuch as the large increase of mail transportation—the increase having been from 6,000 pounds in 1870 to 10,500 pounds in 1874, and to 15,000 pounds in 1876—is drawn largely from the transportation of gold coin and other express matter, which was formerly done by the express department of the company, and is now largely sent by mail in sealed packages. The weight, as ascertained at the last weighing, will be assumed as the daily amount transported, until the Government or the railroad company request a re-weighing. We assume this is very fair toward the Government, inasmuch as the mail matter is constantly increasing, as the figures we have alluded to show. The compensation we now propose to charge is less than that allowed us from 1870 to 1874.

Very respectfully,
SIDNEY DILLON, Pres't.

116 154 & 402

JAN 11 1898
JAMES H. McKENNEY,
CLERK.

IN THE SUPREME COURT OF THE UNITED STATES.

THE UNION PACIFIC RAILWAY COMPANY,
Appellant,
vs.
THE UNITED STATES,
Appellee.

No. 1034.

Brief on the Petition of the Appellant Railway Company for a Writ of Certiorari and other relief.

JOHN F. DILLON
AND
J. M. WILSON,
For the Appellant Railway Company.

SIDNEY BARTLETT,
Of Counsel.

C. G. BURGOYNE'S "Quick" Print. 146, 148 & 150 Centre St., N. Y.

Supreme Court of the United States.

The Union Pacific Railway Company,
Appellant,

against

The United States,
Appellee.

No. 1034.
Oct. Term, 1885.

Brief on the Petition of the Appellant Railway Company for a Writ of Certiorari and other relief filed herewith.

JOHN F. DILLON and
J. M. WILSON,
For Petitioner.

PURPOSE OF PRESENT PETITION.

It was an undisputed fact in the cause in the Court of Claims that the Railway Company, on September 1, 1876, by the letter of its President of that date (Exhibit B, attached to the present Petition), *fixed the* *rates* that it would charge the Government for the postal service in question, and gave notice thereof to the Postmaster-General.

See proofs of this in the present Petition.

This fact was admitted on the first trial of the Court of Claims, as its findings in cause No. 12,515 show, and that admission still continues binding upon the parties and part of the record of the present cause.

THE PURPOSE OF THE PRESENT APPLICATION is to have such admitted fact made part of the record on the present appeal.

This could be readily accomplished by a stipulation by the Attorney-General that that letter of September 1, 1876, was written and received, and might be treated as part of the record on this appeal.

But if he declines to make such stipulation, then on filing the record of the Court of Claims on the first trial showing the fact, we ask that this Court will treat such record as part of the record on this appeal. If such an order cannot be made, then we ask for a *certiorari* to the Court of Claims to send up the record of the first appeal in cause No. 12,515, including the findings of fact therein, and if the recent opinion and judgment of this Court on the late motion of the appellant company for an order for a more specific finding of facts by the Court of Claims stands in the way of the issue of such *certiorari*, then we ask a rehearing only so far as it may be necessary in order to get the letter of September 1, 1876, into the record.

Materiality of the Said Letter.

We suppose that the materiality of the letter and its legal effect properly belong to the argument on the final hearing.

Nevertheless, a *prima facie* showing that the letter *may be* material may be required as a condition of making the order asked. On this subject an outline of the views we would like to present at the bar on the argument of the cause, is the following:

The original petition in 12,515, as well as the amended petition found in the present record, seeks (*Record, p. 36, paragraph VII.*), to recover not on a *quantum meruit,* but upon and according to the rates which were determined and fixed by said letter of September 1, 1876.

The Court of Claims mistook the pleadings and claims of the company in this respect, and made no finding upon the issue, whether the company had fixed rates, and what they were, or whether such rates were unfair, but went upon the erroneous assumption that the action was to recover upon a *quantum meruit,* the onus to show the value of each specific service resting upon the company.

And the nature of the 16th finding of the Court of Claims led this Court to observe on its recent opinion on the late Motion that

> "The question to be determined was one of fact, as much so as the recovery in any action *quantum meruit.*"

Such it is respectfully submitted, was not the nature of the action.

It was an action to recover upon and according to the *rates* the Company had fixed; and the testimony as to the five matters specified in this Court's recent Opinion, viz., the express service, earnings of passenger cars, rates for extra baggage, first-class freight rates, and allowances by connecting roads, was offered, not as evidence of a *quantum meruit*, but as evidence showing that the rates fixed by the company for the postal service were fair and reasonable, because not in excess of what was paid by private persons for the same kind of service.

The Company has the right to fix its rates for all customers including the Government.

The Contract as to Mail Compensation.—The company shall at all times transport mails, troops, munitions of war, supplies and public stores, whenever required to do so, giving the Government at all times the preference in the use of the name "at fair and reasonable *rates of compensation*, not to exceed the amounts paid by private parties for the same kind of service" (Sec. 6, Act July 1, 1862).*

---

* *Northern Pacific Charter*, July 2, 1864 (13 Stats., 365), and *Atlantic and Pacific Charter*, July 27, 1866 (14 Stats., 292), contain these provisions:

"*The said company shall not charge the Government higher rates than they do individuals for like transportation and telegraphic service*" (Sec. 5).

"Shall be a post route and military road, subject to such regu-

SECTION 6 OF THE ACT OF 1862 RESPECTING THE COMPENSATION TO THE UNION PACIFIC COMPANY FOR TRANSPORTING THE MAIL IS A CONTRACT BINDING ALIKE UPON THE GOVERNMENT AND THE COMPANY.

The proposition that section 6 constitutes a contract is no longer open to discussion, since it has been expressly adjudged by the Supreme Court of the United States in the *Union Pacific Railroad Company vs. The United States* (104 U. S., 662).

The head note correctly summarizes the case as follows:

"1. The sixth section of the Act of Congress of July 1, 1862 (c. 120), incorporating the Union Pacific Railroad Company (12 Stats., 489), constitutes a *contract* between the United States and the company, whereunder the latter, for its service in transporting upon its road from January 1, 1876, to October 1, 1877, the mails and the agents and clerks employed in connection therewith, is entitled to compensation at fair and reasonable rates, not to exceed those paid by private parties for the same kind of service.

"2. The *contract* is not affected by the sections of the Revised Statutes declaring that the Postmaster-

---

lations as Congress may impose restricting the charges for such Government transportation" (Sec. 11).

"*Directors may fix, determine and regulate the fares*, tolls and charges to be received and paid for the transportation of persons and property on said road" (Sec. 13).

Texas Pacific Charter, March 3, 1871, (16 Stats., 573), same provision (Sec. 19) as to Government service and "rates of compensation" therefor as in the sixth section of the Union Pacific Charter.

All of these companies, including the Union Pacific, may, it is clear, fix rates for Government service with the restriction that they must not charge the Government more that they do private persons.

General may fix the rate for such service when performed by railroad companies to which Congress granted aid, and he had no authority to insist that it was not binding upon the United States."

To appreciate the force of the decision, it should be remembered that section 4001 of the U. S. Revised Statutes (*adopted in* 1874) provides that

> "All railway companies to which the United States have furnished aid by grant of lands, right of way, or otherwise, shall carry the mail at such prices as Congress may provide; and until such price is fixed by law, the Postmaster-General may fix the rate of compensation."

Section 4002 of the U. S. Revised Statutes fixes a scale of maximum rates, graded according to the average weight of the mails carried, according to which the Postmaster-General is authorized and directed to readjust the compensation thereafter to be paid for the transportation of mails on said railroad routes. And it was in accordance with a readjustment based on the rates from time to time fixed by Congress for other roads, that, in the present case, the Government insisted that the Railroad Company was bound to conform its claims, and the Court of Claims so adjudged.

But the Supreme Court of the United States reversed this decision of the Court of Claims, saying in the opinion (664): "*We have no hesitation in conceding that the section quoted* [section 6] *constitutes* A CONTRACT *between the United States and the Railroad Company*," and it was adjudged that the Railroad Company was entitled to compensation *at fair and reasonable rates, not to exceed the amounts* *paid by private parties for the same kind of service,* "ACCORDING TO AND SUBJECT ONLY TO THE LIMITATION REQUIRED BY THE SIXTH SECTION OF THE ACT OF 1862" (p. 668).

In the Sinking Fund Cases (99 U. S., 700, arising under the Thurman Act), Mr. Chief-Justice WAITE, delivering the majority opinion, says (p. 718): "THE UNITED STATES ARE AS MUCH BOUND BY THEIR CONTRACTS AS ARE INDIVIDUALS."

By section 6 the company is entitled to "reasonable *rates of compensation*," &c.

By section 18: "*whenever* the net earnings of the entire road * * * shall exceed ten per cent. upon its cost * * * Congress may reduce the *rates of fare* thereon, if unreasonable in amount, and may fix and establish the same by law."

THE CONTRACT MEASURE OF COMPENSATION—A READING OF THE STATUTE.

WHAT IS A "RATE OF COMPENSATION" OR "RATE OF "FARE," AS THESE WORDS ARE USED IN THE RAILWAY COMPANY'S CHARTER?

A RATE *means a common, settled, fixed toll or standard charge for all persons.*

Lord HALE: "A right of *franchise or privilege,* that no man may set up a common ferry for all passengers without a prescription time out of mind or a charter from the King. He may make a ferry for his own use or the use of his family, but not for the common use of all the King's subjects passing that way; because it doth in consequent tend to a common charge, and is become a thing of public interest and use, and every man for his passage pays a *toll, which is a common charge*, and every ferry ought to be under a public regulation." (*De Jure Maris*, p. 6, Hargr. Law Tracts.)

"No man can can take a settled or constant toll even on his own private land for a common passage without the King's license." (*Ib.*, p. 10.)

"No man can take *constant rates* for the lading of merchandize (at a port or wharf), but he may make particular agreements with every one that comes there by his consent to land his goods. This was resolved, P. 11 *Car.* B. R. in Morgan's case, for taking twopence for every barrel of beer landed at Crockam-pill, for which constant taking he was fined 100 marks." (*Ib.*, p. 77.)

"A man may for his *private* advantage set up a wharf or crane and take what *rates he and his customers may agree on*." (*Ib.*, p. 77.)

"If the King or subject have a *public* wharf licensed by the Queen, there cannot be taken arbitrary and excessive duties for wharfage; but the duties must be reasonable and moderate, though settled by the King's license, for the property is affected with a public interest, and ceases to be *juris privati* only." (*Ib.*, pp. 77, 78.)

The above extracts constitute the text of the decision of the United States Supreme Court in the Granger Cases, 94 U. S., 113, 126.

"The right to erect *public* wharves and to demand *tolls or fixed rates* of wharfage is, according to the better view, a franchise, which must have its origin in a legislative grant."

Dillon, Mun. Corp., Sec. 108 and cases cited.

"According to all the authorities, English and

American, the grant of a ferry *in its very nature implies the taking of tolls by the grantee.*"

Per Gray, C. J., in Att'y-Gen. *v.* Boston, Mass., 460, 470—1877, citing Hale De Jure Maris, Ch. 2; Woolrych on Ways, 217; North &c. Ferry *v.* Barker, 2 Exch., 136, 149; Fay, pet'r, 15 Pick., 243, 250; Newburgh Turnpike *v.* Miller, 5 Johns. Ch., 101, 112; Aikin *v.* Railroad, 20 N. Y., 379, 386.

"The consideration by which individuals are invited to expend money upon great, expensive and hazardous undertakings, as roads and bridges, and to become bound to keep them in constant and good repair, is the grant of an exclusive right to take toll."

Per Kent, Chancellor, 5 Johns. Ch. Rep., 112, *supra.*

THE POWER TO FIX RATES GIVES THE UNION PACIFIC COMPANY ITSELF THE RIGHT TO PRESCRIBE ITS OWN TOLLS OR CHARGES, subject only to the limitation that they must not be excessive or unreasonable, and stands in opposition to what Lord Hale (De Jure Maris) calls "conventional" duties or rates that are to be fixed only by special agreement with the customer.

The right of the Union Pacific Company itself to fix rates for transportation is *implied*—

(A) In the charter authority (Sec. 1) "to construct, furnish, maintain and enjoy a continuous railroad."

(B) In sections 6 and 18, where it speaks of "rates of compensation," "rates of fares;" Sec. 18, implication from the 10 per cent. clause.

(C) It was so distinctly understood by Congress when the charter was passed, as shown by the discussions which were reprinted at pages 33–36 in our printed brief upon the late motion.

(D) The exercise of this power on the part of the Union Pacific Company has, from the first, been unquestioned.

This power extends to fixing rates for Government service, with the limitation that they must be "fair and reasonable" (*which is simply the common law*), "not to exceed the amounts paid by private parties for the same kind of service" (*which is the English Equality Clause*), reprinted in brief on late motion (p. 36).

Not the "same service," but "the same *kind* of service."

English Parliament has never fixed rates for carrying mails, but leaves that to be determined by contract between the Government and the Companies.

The Company fixed its rates by President Dillon's letter September 1, 1876, at "less than rates allowed by the United States to the Company from 1870 to 1874," as the letter itself states.

Why should not this letter be in the record on this appeal, to the end that its legal effect may be presented and adjudged?

As the *rates fixed* by the Company were *disputed*, and as these rates were based upon the similarity of the express service, the *statutory contract made it material* to inquire whether there was any service of the *same kind* as the mail service and what was paid by private parties therefor.

This record on this appeal as it now stands is silent:

(*a*) As to existence of similar services.

(*b*) What was paid therefor.

(*c*) What rates, if any, were fixed by the company for the service in question, and whether they

> were, or were not, fair and reasonable; whether they did, or did not, exceed what was paid for like services by the public.

THIS COURT has said (104 U. S., 667) that the *whole field of service, not only the express,* but passenger service and other service should be considered, in order to determine the measure of compensation for the postal service.

Accordingly, both parties took such proof.

The Government in this matter is simply a customer of the road. The company had the same right to fix rates for it as for private parties.

There may be a question on which party the *onus rested* as whether the rates fixed for the mail service were fair and reasonable.

Assume this onus to be on the company, the company met it; and the five lines of testimony referred to in the late Opinion of this Court were offered to show not a *quantum meruit, but that its charges were fair and reasonable, not in excess of what private parties paid.*

These facts were proper by the very terms and purpose of the contract to be passed upon, in order to determine the issue, viz., *whether the company was charging the Government more than it charged private parties.* If not, then its rates would thus be proved to be fair and reasonable.

When the letter is before the Court, we purpose to argue and present the proposition that the sixteenth finding of fact (Record, p. 23) is not only not a finding in the nature of a special verdict, *but that it does not pass upon or decide the fundamental issue in the cause.*

WE HAVE BEFORE US A MOST REMARKABLE RESULT:

1 There was no evidence in the Court below that the charges fixed by the company were unfair.

(See former petition as to this point.)

2. *The U. S. never acted under Secs. 4001 and 4002,* and subsequent acts fixing a maximum, within which the Postmaster-General should adjust the compensation of land grant roads, and neither that *official nor any other ever made* any inquiry as to what ought to be allowed to the appellant company.

It simply allowed to the appellant what it allowed roads east of the Missouri River.

3. There was no evidence before that Court of Claims of any description showing the principles or elements on which the "maximum rates established by law for the same kind of service on non-aided railroads" were fixed, but notwithstanding this the following is the finding of the Court (Record, p. 34):

> "The Treasury Department, in making up the account for carrying the mails, has allowed the maximum rates established by law for the same kind of service by *non-aided railroads.*"
>
> "The Court has found as a fact that the rates allowed by the Treasury Department are fair and reasonable, and not in excess of the rates paid by private parties for the same kind of service."

And yet it precisely happened, by a most extraordinary conjunction and accident, that the maximum rates fixed by law for Eastern non-aided roads, in level and thickly settled regions, where the cost of the service is much less, measured to a cent what the Union Pacific Company was under its contract with the United States entitled to charge.

On the doctrine of chances this could never happen again in a thousand years!

Must this miracle be accepted as a rule of law?

These views were not presented in the recent argument, and the appellant company respectfully submits and urges that it is entitled to have before the Court on this appeal the record of cause No. 12,515, and the findings of fact therein, and particularly the said letter of September 1, 1876.

JOHN F. DILLON and
J. M. WILSON.
For the Railway Company.

S. BARTLETT,
Of Counsel.

Jan. 9, '86.—50

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Office Supreme Court U. S.
FILED.
JAN 15 1886
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

October Term, 1885.

The Union Pacific Railway Company, appellant,
vs.
The United States, appellee.
No. 1034.

BRIEF FOR THE UNITED STATES ON THE PETITION OF THE APPELLANT FOR A WRIT OF CERTIORARI AND OTHER RELIEF.

In the Supreme Court of the United States.

OCTOBER TERM, 1885.

THE UNION PACIFIC RAILWAY COMPANY, appellant,
vs.
THE UNITED STATES, APPELLEE.
No. 1034.

BRIEF FOR THE UNITED STATES ON THE PETITION OF THE APPELLANT FOR A WRIT OF CERTIORARI AND OTHER RELIEF.

This suit was brought by the Union Pacific Railway Company against the United States under sections 5260 and 5261 of the Revised Statutes to recover, among other things, the price of the transportation of mails by the company, in accordance with the requirements of its charter. One of the controversies in the case was as to what would be "fair and reasonable rates of compensation" for such transportation, not to exceed the amount paid by private parties for the same kind of service.

The case has been before this court on a former appeal. The court then said: "It would be proper to look over the entire field of service in determining what was a fair and reasonable charge for a kind which was similar to, but not identical with, any other."

The court further said that upon a "retrial, if the parties do not agree upon the amount or upon the rule of computation, the compensation at fair and reasonable rates must be determined upon a consideration of all the facts material to the issue, not to exceed the amounts paid by private parties for the same kind of service."

The judgment of the Court of Claims having been reversed, the case was sent back to that court (*Union Pacific Railroad Company* vs. *United States*, 104 U. S., 667). When the case went back evidence was offered by both parties upon the points referred to.

The prayer of the petitioner now is that the findings of fact in No. 12515, and particularly a letter of September 1, 1876, signed by Sidney Dillon, president, and addressed to the Postmaster-General, be ordered to be made and considered a part of the record on this appeal; and to that end, if necessary, that a writ of *certiorari* issue to the Court of Claims requiring it to transmit to this court the record and findings of fact in No. 12515, and the said letter of September 1, 1876, to which end it prays that the appellant's motion, heretofore filed at this term for a further finding of facts by the Court of Claims, and the order of this court entered thereon, may be reheard, if such rehearing shall be necessary, in order to get said letter of September 1, 1876, before this court as part of the record on this appeal.

In the first place we submit that this court now has nothing whatever to do with the findings of fact by the Court of Claims in No. 12,515. The case now under review is not No. 12515, but No. 14389, in the Court of Claims. The record will show that the case now pending was commenced by three distinct petitions, as follows: The Union Pacific Railway Company *vs.* The United States, No. 11901, petition filed January 8, 1878; The Union Pacific Railway Company *vs.* The United States, No. 12515, petition filed April 14, 1881; The Union Pacific Railway Company *vs.* The United States, No. 14389, petition filed June 6, 1884. On December 8, 1884, the Court of Claims made the following order:

> It is ordered by the court, the parties thereto consenting, that the above entitled causes be, and the same are hereby, consolidated, and that they be hereafter proceeded with as one cause under No. 14389.

An amended petition was then filed as a substitute for all previous petitions.

The findings of fact in No. 12515 had been based upon the stipulation of the parties filed in that case, but this case was not tried upon that stipulation, and had no connection with it. More than three years after that stipulation was filed a third petition was filed, extending and varying the claims on both sides. Six months later the claimant filed a new petition (a fourth) covering all the claims in the three preceding petitions.

This became a new case, and was so tried. Each party presented new requests for findings, briefs, and arguments, wholly independent of the former proceedings. Neither party relied upon that stipulation. It is not referred to in the requests of either party, or in the arguments, and was not called to the attention of the court. They proceeded *de novo* upon the amended petition in No. 14389.

From the decision of the court in that case this appeal has been taken. If the appellant relied upon the stipulation, it should have done so in the court below, and not in this court for the first time. It is too late to introduce it now.

In the second place, we submit that the prayer of the petitioner to produce the letter referred to, of September 1, 1876, is nothing more nor less than a proposal to bring up the evidence in the case, which this court has repeatedly decided cannot be done. In the case of McClure *vs.* The United States, decided at this term, on the 21st of December, 1885, on motion, the court said:

> It is not pretended that the evidence can be brought up unless the statute under which the suit is brought takes the case out of the operation of our rules regulating appeals from the Court of Claims. The original act which gave the right of appeal from the Court of Claims to this court was passed March 3, 1863, and provided that the appeals should be under such regulations as the Supreme Court may direct.

This provision is still found in section 708 of the Revised Statutes. At the December term, 1865, this court adopted certain rules for the regulation of such appeals, and rule 1 was as follows:

> RULE 1. In all cases hereafter decided in the Court of Claims in which, by the act of Congress, such appeals are allowable, they shall be heard in the Supreme Court upon the following record and none other: 1. A transcript of the pleadings in the case, of the final judgment or decree of the court, and of such interlocutory orders, rulings, judgments, and decrees as may be necessary to a proper review of the case; 2. A finding of the facts in the case by said Court

> of Claims, and the conclusions of law on such facts on which the court founds its judgment or decree—the finding of the facts and the conclusions of law to be stated separately and certified to this court as part of the record. The facts so found are to be the ultimate facts or propositions which the evidence shall establish in the nature of a special verdict, and not the evidence on which those ultimate facts are founded. (See Burr *vs.* Des Moines Company, 1 Wallace, 102.)

This rule was amended in some particulars at the December term, 1872, but not in a way to affect the present case. It has been in force substantially in its original form from the time of its adoption until now, and has always been strictly adhered to. Such being the case, when Congress passes a special statute allowing suit to be brought in the Court of Claims with a right of appeal to this court, the appeal will be governed by the rules applicable to cases arising under the general jurisdiction of the court, unless provision is made to the contrary.

In the case of the Francis Wright (105 U. S., 387), where the question was as to the kind of facts the court could be required to put in its findings, this court said it did not include "mere incidental facts, which only amount to evidence bearing on the ultimate facts of the case." It has been repeatedly decided in this court that questions depending on the weight of evidence must be conclusively settled in the court below.

The letter of the 1st of September, 1876, which it is now sought to bring here, was a part of the evidence considered by the Court of Claims when it found that the "amounts allowed and retained by the Treasury Department for transportation of mails are a fair and reasonable compensation for the service, and not in excess of the rates paid by private parties for the same kind of service." If that letter is now brought up here, this court would be required to determine as to its comparative weight, to weigh conflicting testimony and balance admitted facts. Certainly the rule contemplates no such practice. The function of this court is to declare the law upon facts found in the court below, which must be taken to be undisputed.

In the third place, we submit that rule 14 is not applicable to the pending motion. It is not suggested that there is any diminution of the record in the case now brought here for review.

In conclusion, we insist that the prayer of the petitioner cannot be granted without a departure from the well-established practice of this court, and that this motion is nothing more nor less than an attempt in another form to accomplish what the appellant failed to accomplish by its motion to remand this case for further findings, which was decided adversely on the 21st of December, 1885.

Very respectfully,

JOHN GOODE,
Solicitor-General.

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OFFICE SUPREME COURT U. S.
FILED.
JAN 18 1886
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1885.

THE UNION PACIFIC RAILWAY COMPANY, appellant, *vs.* THE UNITED STATES.	No. 1034.
THE UNITED STATES, APPELLANT, *vs.* THE UNION PACIFIC RAILWAY COMPANY.	No. 1035.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1885.

THE UNION PACIFIC RAILWAY COMPANY, appellant, *vs.* THE UNITED STATES.	No. 1034.
THE UNITED STATES, APPELLANT, *vs.* THE UNION PACIFIC RAILWAY COMPANY.	No. 1035.

BRIEF FOR THE UNITED STATES.

This suit was commenced in the Court of Claims by three distinct petitions, as follows: The Union Pacific Railroad Company *vs.* The United States, No. 11901, petition filed January 8, 1878; the Union Pacific Railroad Company *vs.* The United States, No. 12515, petition filed April 14, 1881; The Union Pacific Railroad Company *vs.* The United States, No. 14389, petition filed June 6, 1884.

On December 8, 1884, the Court of Claims made the following order:

> It is ordered by the court, the parties thereto consenting, that the above-entitled causes be, and the same are hereby, consolidated, and that they be hereafter proceeded with as one cause, under No. 14389.

An amended petition was filed as a substitute for all previous petitions, which is found in the record. The railroad of the claimant is composed of three separate divisions: First, the Union Pacific Division, from Council Bluffs to Ogden; second, the Kansas Pacific Division, from Kansas City to Denver, and, third, the Denver Pacific Division, from Denver to Cheyenne.

In the court below the claimant prayed judgment on account of the several matters set forth in its petition, amounting in the aggregate to $3,393,905.75. The United States filed a counter-claim for $11,500,000. As a conclusion of law upon its findings of fact, the Court of Claims decided that the claimant was entitled to be paid the sum of $2,910,124.08, and that the United States was entitled to be paid the sum of $4,487,807.39.

Upon the whole case the Court of Claims decided that the United States was entitled to a judgment for the difference, amounting to $1,577,683.31. The United States have appealed to this court from so much of the judgment of the Court of Claims as allows to the claimant the sum of $2,910,124.08, and the claimant has appealed from the judgment of the Court of Claims rendered against it.

On the appeal of the United States the following assignment of errors is made:

1. That the Court of Claims erred in holding that the

claimant was entitled to charge the Government for transportation over the bridge at Omaha at the same rate that it charges the general public, and that it was not limited for that transportation to a *pro rata* per mile.

2. The Court of Claims erred in holding that the railroad company was not limited in its charges to the Government for carrying passengers between Council Bluffs and Ogden to such sum as such passengers would have paid it if they had been through passengers.

3. That the Court of Claims erred in holding that the railroad company is entitled, under provisions of section 1 of the Thurman act, to have deducted from the gross earnings the amount set forth in Exhibit D, found in the record, in order to ascertain the net earnings.

As to the first assignment of error, the contention of the Government is that it should pay only the same rate over the Omaha bridge that it pays on roads leading to said bridge. The railroad company claims that it is entitled to charge for transportation of troops and supplies over the said bridge at a rate in excess of that charged over the rest of the road. The railroads leading to the bridge are the Chicago and Northwestern; the Chicago and Saint Paul; the Chicago, Rock Island and Pacific, and the Union Pacific. The bridge, with its approaches, is 3.97 miles long.

In the case of the Union Pacific *vs.* Hall (91 U. S., 343) this court held that the eastern terminus of the road is on the Iowa shore of the Missouri River, that the bridge is a part of the Union Pacific Railroad, and that the company was bound to run and operate the whole road, including the bridge, as one connected and continuous line.

In order to build a bridge it became necessary for the company to issue bonds, and in 1871 an act was passed (16 Stats., 430) authorizing the Union Pacific Railroad Company to issue such bonds and to secure the same by mortgage, as it should deem needful, not exceeding $2,500,000, to construct and maintain its bridge over the Missouri River, upon the condition that for the use and protection of said bridge and property the Union Pacific Railroad Company shall be empowered, governed, and limited by the provisions of an act entitled "An act to authorize the construction of certain bridges, and to establish them as post-roads," approved July 25, 1866, so far as the same is applicable thereto.

Section 3 of the act of July 25, 1866, referred to, provides (14 Stats., 244)—

> That any bridge constructed under this act and according to its limitations shall be a lawful structure, and shall be recognized and known as a post-road, upon which, also, no higher charge shall be made for the transmission over the same of the mails, troops, and munitions of war of the United States than the rate per mile paid for their transportation over the railroads or public highways leading to the said bridge.

The company availed itself of the privilege afforded by the act of 1871, by issuing bonds to the amount of $2,500,000. We submit that, upon a fair construction of the act of 1871, it supersedes so much of the act of 1862 as provides that transportation for the Government should be at fair and reasonable rates, and not in excess of those paid by private parties for the same kind of service. In other words, that the language in the act of 1871, by which any bridge built under its provisions was made subject to the act of 1866, applies to the rates of compensation to be paid by the United States for the transportation of its passengers between Council Bluffs and Omaha, a distance of 3.97 miles over the claimant's road road, within which the bridge is constructed.

As to the second assignment of error, our contention is that the railroad company is not entitled to charge to the Government for a passenger who travels from Council Bluffs to Ogden at its regular rates, which is a greater sum than its pro rata would be if the passenger had purchased a ticket in New York for San Francisco instead of purchasing it at Council Bluffs for Ogden.

Section 6 of the act entitled "An act to aid in the construction of a railroad and telegraph line over the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes," provides as follows:

> SEC. 6. *And be it further enacted*, That the grants aforesaid are made on condition that said company shall pay said bonds at maturity and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit dispatches over said telegraph line and transport mails, troops, and munitions of war, supplies and public stores upon said railroad for the Government whenever required to do so by any Department thereof, and that the Government shall at all times have the preference in the use of the same for all the purposes aforesaid at (fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service).

We submit that under the provisions of the section just quoted the Government is to pay not to exceed what is paid by private parties *for the same kind of service.* In other words, when a passenger takes the train at Council Bluffs and is carried to Ogden by the side of another passenger who has traveled from New York on a through ticket, the service rendered in both cases is *the same kind of service*, and therefore the Government is entitled, according to the provisions of the statute, to have its passengers carried at the same rate of compensation that the company receives from the through passenger.

Upon this branch of the case the Court of Claims has found as a fact that in some instances the requisition for transportation presented to the agent of the company stated on its face that the passenger was bound from sea-board to sea-board, and in others the requisition furnished no information on the subject. How much of the sum disallowed was for one and how much for the other kind of requisition is not shown, but the company concedes the reduction in the former cases.

The third assignment of error presents the question as to what is meant by the following words, found in the first section of the Thurman act, to wit: "The necessary expenses actually paid within the year in operating the same and keeping the same in a state of repair."

The contention of the Government is that the expenses embraced in Exhibit D, amounting to the sum of $2,763,670.64, being construction and improvement expenses, were not necessary expenses within the meaning of the statute, and the claimants contend that they were.

Section 1 of the act of May 7, 1878, commonly called the "Thurman act," reads as follows:

> That the net earnings mentioned in said act of 1862 of said railroad companies, respectively, shall be ascertained by deducting from the gross amount of their earnings, respectively, *the necessary expenses actually paid within the year in operating the same and keeping the same in a state of repair*, and also the sum paid by them, respectively, within the year in discharge of interest on their first-mortgage bonds, whose lien has priority over the lien of the United States, and excluding from consideration all sums owing or paid by said companies, respectively, for interest on any other portion of their indebtedness; and the foregoing provision shall be deemed and taken as an amendment of said act of 1864, as well as of said act of 1862. This section shall take effect on the 30th day of June next, and be applicable to all computations of net earnings thereafter, but it shall not affect any right of the United States or of either of said railroad companies existing prior thereto.

When this act of Congress was passed on May 7, 1878, a suit was pending in the Court of Claims between the Union Pacific Railroad Company and the United States, which involved the questions: First, what was the date of the completion of the road? Secondly, should sums paid for interest on first-mortgage bonds be deducted to ascertain the net earnings? And, thirdly, should expenditures incurred in enlarging and improving the works, in addition to those incurred in operating the works and keeping them in good condition and repair, be deducted to ascertain the net earnings?

The Government contended that the road was completed on the 6th day of November, 1869; that interest on the first-mortgage bonds should not be deducted, and that, while ordinary operating and repair expenses might be deducted, the outlay for improvement and betterments should not.

The Court of Claims held that the road was completed on the 6th day of November, 1869; that interest on the first-mortgage bonds should not be deducted, and that, as the construction fund of the company had not been exhausted, the expenditures for construction were not chargeable to the earnings, and should not be deducted from the gross earnings to ascertain the net earnings.

This court affirmed the judgment of the Court of Claims as to the first and second points, but reversed it as to the third, being of opinion that construction and improvement expenses should be deducted. The issue in that case arose upon a counter-claim of the United States demanding 5 per cent. of the net earnings from November 6, 1869, to November 5, 1875, and the decision of this court referred to, was based entirely upon the act of 1862.

In the present case, however, the counter-claim of the United States demands 5 per cent. of the net earnings from November 6, 1875, to June 30, 1878, as to which the decision of this court clearly applies, and there is no dispute as to the deductions to be made for that period. But the present counter-claim also demands 25 per cent. of the net earnings from July 1, 1876, to December 31, 1882, which are to be ascertained, as we insist, in the mode pointed out by the act of 1878; that is to say, by deducting only the ordinary operating expenses and costs of repair.

The amount in dispute, as shown by Exhibit D, is $2,763,670.64, 25 per cent. of which is $690,917.66. In the case already referred to of the Union Pacific Railroad Company *vs.* The United States (99 U. S., 402), Mr. Justice Bradley, speaking for the court in interpreting the act of 1862, says:

> It is better for the ultimate security of the Government in the payment of its loan, as well as for the service it may require in the transportation of its property and mails, that $100 should be spent in improving the works than that it should receive $5 in payment of its subsidy.

But Congress, having found the operations of that act to be unsatisfactory, has declared, in the preamble to the act of 1878, that—

> The United States, in view of the indebtedness and operations of said railroad companies, respectively, and of the disposition of their respective incomes, are not, and cannot without further legislation be, secure in their interests in and concerning said respective railroads and corporations.

The further legislation enacted by the act of 1878 has not only increased the 5 per cent. to 25 per cent., but has also defined the net earnings. It is insisted by the Government that Congress in this definition had in view the distinction then well known and accepted between operating expenses and construction and improvement expenses. Mr. Justice Bradley, in the same opinion referred to, points out that distinction as follows:

> It may often be difficult to draw a precise line between expenditures for construction and the ordinary expenses incident to operating and maintaining the

> road and works of a railroad company. Theoretically, the expenses chargeable to earnings include the general expenses of keeping up the organization of the company and all expenses incurred in operating the works and keeping them in good condition and repair; whilst expenses chargeable to capital include those which are incurred in the original construction of the works and in the subsequent enlargement and improvement thereof.

Again, we submit that the railroad company is estopped by its own action from disputing the construction of the statute for which we now contend. The Court of Claims has found the following facts in this case, pages 22 and 23 of the record:

> From 1869 the directors of the Union Pacific Company have made annual printed reports to the stockholders, which were furnished to the Government directors, to any one who applied, and were open to inspection by the general public. They were the only official publications that the company made. In these reports the statement of "operating expenses" was invariably kept separate from expenditures for new construction and new equipment. The following extracts from the report of 1879 show the method in which the company, from 1869 to 1882, indirectly have treated the matter in their reports:
>
> "The earnings and expenses for the year 1879 are as follows:

Gross earnings, including Omaha bridge	$13,201,077 66
Deduct operating expenses (including taxes)	5,475,503 44
Surplus earnings	7,725,574 22

The operating expenses were 41.48 per cent. of the gross earnings. The earnings and expenses for the years 1878 and 1879, including Omaha bridge, compare as follows :

	1878.	1879.
Gross earnings	$13, 121, 272 58	$13, 201, 077 66
Operating expenses	5, 376, 586 19	5, 475, 503 44
Surplus earnings	7, 744, 686 39	7, 725, 574 22
Percentage of expenses:		
Earnings	40 98	41 48

" For a more detailed statement of the operating expenses, and a comparison thereof with the year 1878, attention is called to the table hereto appended." " The construction expenditures of 1879, were as follows."

Then follows a table identical with that of Exhibit D for that year. There is also found in said report a detailed statement of operating expenses for 1878–1879, the total of which is $5,475,503.44, as aforesaid.

Exhibit D has been taken from the books of the company, where it is kept separately, the separation and division by the company being accepted by the defendants for the purposes of this case, the items being the expenditures shown by the books of the company for " new constructions " and " new equipment." Those items have been reported by the company as " surplus earnings," and as so far increasing the value of its property.

The increase of business which demanded these expenditures resulted from the demands of the public, mostly by reason of the construction of feeders by the company tributary to the main line, which opened a wider extent of country, and not from any special demands of the Government.

We submit also that the report of the Judiciary Committee of the Senate upon the "Thurman act," when it was presented to Congress, shows that it was intended to allow in the future, in addition to the interest due first-mortgage bondholders, the operating expenses as theretofore set forth in the reports of the directors. From that report of the Senate committee we make the following extract:

> The Attorney-General insists that in ascertaining the 5 per cent. of the net profits to which the Government is entitled under the charter, nothing but the operating expenses are to be deducted from the gross receipts of the company; on the other hand, the company contends that net earnings are whatever it has left after payment of all its just and lawful obligations, and in support of this position cites St. John *vs.* The Erie Railway Company, 22 Wallace. That case merely decides that as between a preferred stockholder entitled to dividends out of net earnings and the creditors of a company, there are no net earnings until the creditors are paid, it being a familiar principle that the shareholders of a company cannot lawfully divide its assets or profits among themselves and thereby leave its creditors unpaid.
>
> But the question in this case is different and depends upon the charter of the company, which is as binding upon its creditors as upon its shareholders, and if that entitles the Government as a preferred creditor to 5 per cent. upon the gross receipts less the operating expenses, neither shareholders nor other creditors have a right to complain. The right to the 5 per cent. is given by the sixth section of the act of 1862, and reading that section in connection with the eighteenth section we are not prepared to admit the claim of the company.
>
> But whatever may be the true interpretation of

> this section, we are of the opinion that under its reserved right to alter, amend, or repeal, it is competent for Congress to define, for the future at least, what shall be deemed to be net earnings. And in view of the rights of the first-mortgage bondholders, and as a fair adjustment of the conflicting claims of the Government and the company, we think it would be right to deduct in future not merely the operating expenses, but also the interest on the first mortgage, and the amendment we report is to that effect. As to the past, we leave the question upon the law as it now stands to the decision of the Supreme Court in the case pending before it.

In conclusion, we submit that the words "necessary expenses actually paid in operating and keeping the same in a state of repair" mean what are commonly understood by "working expenses"—that is to say, the expenses of moving trains, working the road, keeping the track in repair, maintenance of cars, rolling stock, &c. Such, we contend, is the ordinary acceptation of the terms employed, and we are sustained in our construction by the history of the legislation referred to and the usage of the company heretofore in making up its reports.

If we are correct in this view it follows that the Court of Claims erred in holding that the company was entitled in ascertaining the net earnings between July 1, 1878, and December 31, 1882, to deduct from the gross earnings of that period the sum of $2,763,670.64 on account of the items set out in schedule D and actually paid by it out of earnings for equipment and improvements.

Very respectfully,

JOHN GOODE,
Solicitor-General.

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JAMES H. McKENNEY,
CLERK.

IN THE SUPREME COURT OF THE UNITED STATES.

THE UNION PACIFIC RAILWAY COMPANY

vs.

THE UNITED STATES.

Nos. 1034, 1035.

OCTOBER TERM, 1885.

Cross Appeals from the Court of Claims.

BRIEF OF THE RAILWAY COMPANY.

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IN THE

Supreme Court of the United States.

Union Pacific Railway Company
against
The United States.

Cross Appeals
Nos. 1034, 1035.

Brief for the
Railway Company.

Statement.

This cause was originally commenced in the Court of Claims by three distinct petitions, as stated in the record of this cause on file herein, page 1. One of said suits was number 12,515. Judgment having been given by the Court of Claims in cause 12,515, against the company, the company appealed therefrom to the Supreme Court, the opinion on which appeal is reported in 104 U. S. Reports, 662 (*Union Pacific Railroad Company vs. The United States*). This Court reversed the judgment of the Court of Claims for reasons assigned in the opinion, and ordered the cause to be remanded to the Court of Claims, with instructions to proceed therein in conformity with the opinion of the Supreme Court. Cause No. 12,515, and the other two, were consolidated on the 8th of December, 1884, and an amended petition filed as a substitute for the previous petitions (Record, p. 1). In the petition originally filed in the said cause No. 12,515 the Union Pacific Company alleged that on the first day of September, 1876,

> "it gave notice to the Postmaster-General of the United States that from and after the first day of February, preceding (1876), your petitioner would require from the Government compensation for the transportation of mails at fair and reasonable rates, and at rates paid by private parties for the same kind of service; and your petitioner hereto annexes a copy of said notice to the Post-office Department (marked Exhibit B), and asks that the same may be taken and deemed to be a part of its petition."

Said Exhibit B annexed to the said petition was a letter of MR. SIDNEY DILLON, the President of the Union Pacific Railroad Company, to the Honorable J. N. TYNER, Postmaster-General, which is printed in the Petition of the appellant Railway Company filed herein at this term, that this cause be remanded to the Court of Claims for a more specific finding of facts, on pages 23 and 24 of said petition. A copy of the said letter, marked Exhibit B, is annexed to a petition of said Railway Company, filed herein at this term, for a writ of *certiorari* and other relief.

In the amended petition in this cause and on which it was tried below, it is alleged as follows:

> "Claimant avers that the several amounts charged in said exhibits for the services so performed were the rates therefor *which it had determined and fixed*, both as respects the Government and the public, and of which the Government and the several departments were duly notified, which rates claimant avers were fair and reasonable and not exceeding the amounts paid by private parties for the same kind of service."

Record, page 3, paragraph VII.

To the amended petition the Government filed an answer in denial, and pleading a counterclaim (Record, p. 6). The Railway Company filed a replication to the counterclaim (Record, p. 8).

The only finding of fact by the Court of Claims, in respect of the issues made as to compensation to the company for mail service to the Government, is the 16th finding, which is as follows :

> "XVI. The amounts allowed and retained by the Treasury Department for transportation of mails, as aforesaid, are a fair and reasonable compensation for the service, and not in excess of the rates paid by private parties for the same kind of service."

Referring to this finding, the Court of Claims, in its opinion in this cause (Record, page 34), says :

> "In this branch of the case the principal controversy was as to the amount of compensation to which the claimant was entitled for carrying the mails over the aided portions of its road, under the Act of 1862. The Treasury Department in making up the account for carrying the mails, has allowed to the claimant the maximum rates established by law for the same kind of service on non-aided railroads, less the reduction made and fines imposed by the Postmaster-General. The claimant demands a much greater rate, and the Assistant Attorney-General contends for a much less rate.
>
> "The Court has found as a fact that the rates allowed by the Treasury Department are fair and reasonable, and not in excess of the rates paid by private parties for the same kind of service. *No question of law arises on that finding.*"

ARGUMENT.

WE WILL FIRST CONSIDER THE RAILWAY COMPANY'S APPEAL.

The 16th finding of fact (the only one in relation to the claim for postal compensation) is insufficient to authorize any judgment thereon, and it was erroneous to enter such judgment.

We submit that the judgment against the company must be reversed, or at all events the cause remanded for a further finding of facts, because of the failure of the Court to find any verdict, general or special, upon the issues made by the pleadings concerning the mail service and the rate of compensation therefor.

The amended and substituted petition on which the cause was tried sought to recover, not on a *quantum meruit*, but upon and according *to rates which the company had determined and fixed*, and of which the Government was duly notified.

Record, page 3, par. V11.

The answer on this subject was in denial.

The only finding of fact is the 16th.

Record, p. 23.

THE RULES of this Court require "a finding by the Court of Claims of the facts in the nature of a *special verdict*;" and in all cases where *such* a finding is requested by a party to a case which may be appealed to the Supreme Court, the duty of the Court to make a finding which substantially answers the well-known purpose of a special verdict, is imperative.

Here the issues were, whether the company had fixed a rate for the mail service, and, if so, whether that rate was fair and reasonable, and not in excess of what was paid by private parties for the same kind of service.

On these issues the Court never passed. There is no finding in respect to them. The record is silent upon the question whether the company had fixed a rate as it alleges, and, if so, whether such rate was fair and reasonable, and whether it did or did not exceed the rates charged to and paid by the public for like services.

Suppose the issues here made had been submitted to a jury, which had returned a verdict in the language of finding No. XVI.

It is obvious that it would have been void either as a general or special verdict and it would not authorize the entry of judgment thereon.

As a trier of facts, the Court of Claims takes the place of a jury. They must, by the rules, find a special verdict and cannot make or render a general verdict or finding against the will of either party. A general verdict would be simply—" We find the issues for the plaintiff (or defendant) and assess his damages at $——.

A special verdict in the Court of Claims must, whatever else it may contain or omit, *find upon the issues made by the pleadings.*

In the present case this was not done, and the result is a miscarriage, for which the cause must be remanded by this Court to the Court below, with directions to make a finding of facts in respect of the issues made by the pleadings. It may be urged that the 16th finding *implies* either that the company had fixed no rates, or if so, that they were unreasonable. It will be seen at once on reading this finding and the opinion of the Court relating thereto (Record, p. 34) that the finding contains no such implication. The case was regarded by the Court of Claims as one upon a *quantum meruit*, and hence it follows, in the view of that Court, that the company must show by independent evidence, other than its rates, what each item of service was worth. If this is so as to the company's service for the Government, it is equally so as to all services for others. No such burden is ever put upon railway companies, which have the right to fix rates for its service.

This finding in question wholly overlooks the company's power to fix rates and the legal effect of fixing its rates for the service it rendered the government. The real issue is entirely missed.

The objection we make is, therefore, not technical, but goes to the very nature of the cause of action as stated in the declaration. The Court of claims attached no importance to the company's action in fixing rates, and hence did not even embody in its findings the action of the company in this respect.

If the finding of facts by the Court of Claims must be a finding upon the issues made, then we have in the record no such finding, and there is no course open but to remand the cause for the requisite finding. A verdict must be responsive to the issues, and must be plain, direct and unambiguous. It cannot be supported by doubtful presumptions or implications. This is such familiar and common learning that it is not necessary to refer to authorities to support it.

THE POWER OF THE COMPANY UNDER ITS CHARTER TO FIX ITS RATES for all customers, including the Government, is argued in a brief filed by us during the present month on the company's petition for a writ of *certiorari* and other relief, and to which we now refer the Court, without here repeating the argument.

We now turn to discuss the questions arising on the appeal taken by the United States. We have not yet seen the brief of the Attorney-General. We assume that he may seek to renew all of the questions made in the Court below, and on this assumption proceed to consider them.

GOVERNMENT'S APPEAL.

I.

Rates over the Omaha Bridge.

The question in controversy on this subject is, whether Sec. 3 of the Bridge Act of July 25, 1866 (14 Stats., 245) as to rates of compensation, applies to the Union Pacific Company for transportation services over its bridge between Council Bluffs and Omaha. This proposition the Government affirms, and the Railway Company denies.

THE FACTS as found by the Court of Claims are stated in its finding No. XI. (Record, p. 16), as follows:

XI.

"The company's uniform rate, during the time covered by this suit, for the transportation of passengers between Council Bluffs and Omaha, over its bridge and approaches, a distance of 3.97 miles, was 50 cents each, which sum was included in the price of tickets sold for longer or shorter distances. That was a fair and reasonable rate of compensation to be paid by the defendants and not in excess of the rates paid by private parties for the same kind of service.

The Treasury Department did not allow 50 cents for each passenger so transported for the defendants, but in each case, ascertaining over what railroad or public highway the passenger reached Council Bluffs or Omaha, and the rate per mile paid by him over such part of said railroad or public highway as he had thus traveled, the company was allowed only the same rate per mile for transporting such passengers between Council Bluffs and Omaha as he had so paid on the road leading to the bridge. On the roads leading to said bridge the rates per mile are different, and the rates on the same road differ according to distance traveled.

The difference between the amount so allowed by the Treasury Department for the transportation of such passengers for the defendants and that which the company should be allowed if it has a right to charge 50 cents for each passenger so transported during the time above specified, is $3,693.31.

Similar rules were applied by the Treasury Department to the transportation of *freight* over said bridge, and the disallowance resulting therefrom amounted to $10,885.34. The rate claimed by the company for transportation of freight over said bridge was fair and reasonable, and not in excess of the rates paid by private parties for the same kind of service."

THE OPINION of the Court of Claims upon these facts is as follows (Record, pp. 35, 36):

"The claimant's uniform rate for the transportation of a passenger between Council Bluffs and Omaha, a distance of 3.97 miles, over its bridge and approaches, was 50 cents during the time involved in this branch of the case. The Court has found as a fact that 50 cents for each of the passengers traveling at the expense of the United States was a fair and reasonable compensation, and not in excess of the rate paid by private parties for the same kind of service.

“ But the Treasury Department has allowed in its accounts much less rates, not uniform, but varying according to the rate per mile paid by the passenger over the connecting road by which he reached the claimant's road. This latter rate was different over different roads and different over the same road, according to the distance traveled thereon. This, it is urged on the part of the defendants, they have a right to do, by reason of the provisions of the Act of February 24, 1871, Chap. 67 (16 Stat. L., 430), the privileges of which the claimant has availed itself of by building its bridge and issuing its bonds in accordance therewith, and which provides that—

“ ‘Said bridge may be so constructed as to provide for the passage of ordinary vehicles and travel, and said company may levy and collect tolls and charges for the use of the same ; and for the use and protection of said bridge and property the Union Pacific Railway Company shall be empowered, governed and limited by the provisions of the act entitled “ An Act to authorize the construction of certain bridges and to establish them as post-roads,” approved July twenty-five, eighteen hundred and sixty-six, so far as the same is applicable thereto.’

“ The act thus referred to is Chapter 246 of 1866 (14 Stat. L., 245), of which Section 3 is as follows :

“ ‘ Any bridge constructed under this act, and according to its limitation, shall be a lawful structure, and shall be recognized and known as a post-route, upon which, also, no higher charge shall be made for the transportation over the same of the mails, the troops and the munitions of war of the United States than the rate per mile paid for the transportation over the railroads or public highways leading to the said bridge.’

“ In our opinion the words, ‘ for the use and protection of said bridge and property ’ in the Act of 1871, by which any bridge built under its provisions was made subject to the Act of 1866, do not apply to the rates of compensation to be paid by the defendant for the transportation of their passengers between Council Bluffs and Omaha, a distance of 3.97 miles over the claimant's road, within which this bridge was constructed.

"In the case of the Union Pacific Railroad Company vs. Hall *et al.* (91 U. S. R., 343), the Supreme Court decided that the bridge constructed by the company between Omaha and Council Bluffs became part of its road, and that it was bound to run and operate the whole road, including the bridge, as one connected and continuous line.

"When the bridge was built it became subject to the Act of 1862, wherein it was provided that transportation for the Government should be at fair and reasonable rates, and not in excess of those paid by private parties for the same kind of service. We do not think that Congress intended by the Act of 1871 to supersede or modify this provision as to any part of the claimant's road."

This view of the Court below is so clearly right that it seems scarcely necessary to enlarge upon the argument in its support.

A more detailed view of the legislation and decisions of this Court will, however, corroborate the soundness of the conclusion reached by the Court of Claims.

The Omaha Bridge was authorized by *implication* in the Act of July 1, 1862 (12 Stats., 489), which (in section 14) fixed the initial point "on the western boundary of the State of Iowa," *there* to connect with Iowa roads.

The Supreme Court says this act "authorized and *required* the company to build their railroad to the Iowa shore."

U. P. Ry. Co. vs. Hall, 91 U. S., p. 350—a case relating to this bridge.

Express authority to build bridges over the Missouri River, with suitable and proper draws, was given by section 9 of the Act of July 2, 1864 (13 Stats., 356).

The Supreme Court say this authority was probably not necessary.

Hall's Case, *supra*, p. 350.

In 1869 the bridge was commenced under these Acts of 1862 and 1864, and was partly unfinished in 1871. It is 3.97 miles long.

Under the Acts of 1862 and 1864, the bridge would be part of the road and covered by the Government lien at rate of $16,000 per mile; and the first mortgage would be limited to $16,000 per mile.

Section 10 of Act of July 2, 1864.

Under these acts the bridge would *be part of road*, and compensation for service thereon to the United States would fall under the legislative contract embodied in section 6 of the Act of 1862; *i. e.*, fair and reasonable rates, &c.

The Bridge Act of 1871 still left the bridge *part of the road* of the company, and it must be *operated* as such.

This was the precise point in Hall's case.

Hall's Case, pp. 350, 353.

The Special Bridge Act of Feb. 24, 1871 (16 Stats., 430), was passed to enable the company to make a mortgage—a first mortgage for $2,500,000 (which the company executed), instead of $16,000 per mile, or $64,000 in all—and to charge special rates for its use. So says the Supreme Court in Hall's case, p. 353.

This act is *in pari materia* with Acts of 1862 and 1864. As there is no repealing clause, it does not repeal the Act of 1862, section 6, unless in conflict with it, which it is not.

The Act of February 24, 1871, authorizes tolls and charges for the *use* of the bridge.

The counsel for the United States urged below that other railroad companies have the right to use the bridge in question under the Bridge Act of July 25, 1866 (14 Stats., p. 245).

But if so, the word " use " refers to their use of the bridge, or to the use of it by local travel. It is appropriate thus to use the word.

The word " *use*," as it occurs in the Special Bridge Act of February 21, 1871, is not appropriate to describe the use of the bridge by the Union Pacific itself.

Our contention is that no other railroad can use our bridge. It is to be distinguished from a bridge built under the Act of July 25, 1866, in this: that act contemplated separate bridge structures, built under local authority, and the same constituted no part of any railroad. Hence the provision in section 1 of the Bridge Act of July 25, 1866, allowing other railroads to cross the Quincy bridge for reasonable compensation. Also in section. 3, Act of 1866, as to charges to the United States.

The mischief intended to be prevented by section 3 of the Bridge Act of July 25, 1866, was arbitrary and extortionate charges to the Government, which, in the absence of such a provision, might be made by the bridge companies at Quincy and elsewhere. No such mischief existed as to the Union Pacific in 1871, when the Special Omaha Bridge Act was passed. *What the Union Pacific could charge the United States had been fixed by section 6 of the Act of 1862.*

The Act of February 24, 1871, left the Omaha bridge part of the Union Pacific Road, and authorized the company to fix rates for transportation thereon.

Congress can reduce rates fixed by the Union Pacific Company, but until it acts the company may fix and determine rates for transportation thereon (see *proviso* in Act of February 24, 1871, as to the regulation of rates on the bridge by Congress, which implies that meanwhile the company may prescribe the rates).

1. If the Government is correct, the Act of February 24, 1871, *repeals* section 6 of the Act of 1862, *by implication, as to about four miles of road*, which is highly improbable.

2. It would also change place of "connection" with Iowa roads (see Hall's Case, *supra*), which is likewise improbable.

3. It would allow rates on our road to be fixed by the price agreed on between the United States and other companies, which is unreasonable, and, therefore, improbable.

4. The curious and unjust results of the construction in the varying allowances for the same service—*much less than the level part of our road*—tend strongly to show this construction to be unsound.

Result.

1. The Act of July 25, 1866, does not apply to the Union Pacific so far as compensation is concerned.

2. The company may fix rates for Government transportation over it, the only limitation being that they must be fair and reasonable, not in excess of what it charges the public, and it is found by the Court below that they are not.

II.

Through passenger rate between Council Bluffs and Ogden.

The Government claimed the benefit of through passenger rates between Council Bluffs and Omaha in respect of passengers who had no through ticket and who were local to the defendants' road. The claim was denied by the company and was disallowed by the Court of Claims.

THE FINDINGS OF FACTS on this subject was as follows (Record, p. 15):

"X.

"The company's uniform rate for the transportation of passengers between Council Bluffs and Ogden, when said passengers purchase tickets at either of those places, is $78.50 each; but, by contracts with connecting railroad companies, the claimant receives from said companies who sell through tickets at reduced rates from New York, San Francisco, and other places over their own and the claimant's road $54 only for each passenger carried between said Council Bluffs and Ogden upon said through tickets, as its proportion of money paid for the whole through distance.

"In computing the compensation set out in Finding IX. the Treasury Department allowed the claimant only $54 for each passenger carried for the defendants, when said passenger did not have a through ticket over its own and other roads, but took the train at Council Bluffs or Ogden upon an order from the defendants' authorized officers to proceed over the road between those places at the charge of the Government.

"The difference between $54 allowed as aforesaid and $78.50 claimed by the company for each passenger so transported by the claimant is $2,855.38 for the period covered by this suit.

"The Court finds that $78.50 is a fair and reasonable rate of compensation to be paid by the defendants for the transportation of a passenger taking a train at Ogden or Council Bluffs and passing over the road between those places, without a through ticket purchased of other roads as aforesaid, and not in excess of the rates charged private parties for the same kind of service.

" In some instances the requisition for transportation presented to the agents of the company stated on its face that the passenger was bound from seaboard to seaboard, and in others the requisition furnished no information on the subject.

" How much of the sum disallowed was for one and how much for the other kind of requisition is not shown, but the company concedes the reduction in the former cases."

THE OPINION of the Court of Claims on this point is as follows (Record, p. 34):

"The claimant has arrangements with the companies of connecting roads by which said companies sell through passenger tickets at reduced rates from New York, San Francisco, and other places over their own and the claimant's road, and pay to the claimant, as its proportion of the through fare between Council Bluffs and Ogden, $54 each. All passengers buying tickets at Council Bluffs or Ogden and taking passage over the claimant's road between those places are charged $78.50. This rate is claimed by the company for every passenger taking passage in like manner at either of those places and traveling for and at the expense of the Government over its road, and not having purchased a through ticket from other places on other railroads, or not having a requisition showing that he was traveling over such other roads in connection with the claimants' road.

" The Court has found that $78.50 is a fair and reasonable compensation for the transportation of a passenger purchasing a ticket at Council Bluffs or Ogden and traveling over the road between those places, and so far as it is a question of fact that it is not in excess of the rate paid by private parties for the same kind of service. The question now is, as a matter of law, if it be a question of law, whether the defendants are bound to pay $78.50 or only $54 for each of their passengers so transported. The Treasury Department have allowed only the latter sum.

"In our opinion the defendants are bound to pay the same rate for each of its passengers so transported as is paid by private parties taking the train in like manner, at the same places, and traveling over the same parts of its road, that being found to be a fair and reasonable compensation; and that when these passengers do not purchase through tickets, and do not have requisitions showing that they are traveling over other roads in connection with the claimants' road, but travel as local passengers, the defendants cannot have them transported at the same rates as the company receives, in its division with other companies, for the transportation on through tickets over its own and other roads."

As it thus appears that, in this matter, the company's rates are fair and reasonable, that it charges the Government for a passenger precisely what it uniformly charges the public under like circumstances, and as the statutory contract does not oblige the company to discriminate in favor of the Government, nothing more seems to be required in support of the conclusion and judgment of the Court of Claims on this point. Indeed, the facts upon this subject, as found by the Court, seem to leave no room for any question of law, or any question whatever requiring serious notice.

THE FOREGOING ARE THE ONLY QUESTIONS WHICH ARISE ON THE GOVERNMENT'S APPEAL.

The foregoing, relating to rates over the Omaha Bridge and to the through passenger rate between Council Bluffs and Ogden, discusses the only questions which, as it seems to us, the Government can urge on the appeal taken by it. The language of the appeal (Record, page 41) is:

"That defendants in the above-entitled cause object to the finding of the Court allowing claimant the sum of $2,910,124.08, and pray an appeal to the Supreme Court from so much of the judgment herein as allows to the claimant that sum."

This appeal by the Government only relates to services rendered the Government by the company (Record, page 36). It follows from this that the question as to deductions that may properly be made from gross earnings in order to ascertain net earnings, under the Thurman Act, to wit, EXHIBIT D, hereinafter referred to, is not before this Court on the appeal taken by the Government, and that the only matters before it on the Government's appeal are those relating to bridge rates and rates for through passengers. The Government has taken no appeal in respect of the judgment of the Court on its counterclaim, and it is on its counterclaim that the question of net earnings under the Thurman Act arises. If this is the true view of the record, as it seems unquestionably to be, then the subject of net earnings next herein discussed is not before the Court on the appeal of the Government. As the finding and judgment of the Court on that subject is favorable to the company, except its judgment in relation to the cash requirements under section four of the Thurman Act, the company makes no objection thereto, save in respect of one item, namely, the amount of the cash requirement under the Thurman Act for the year ending December 31, 1882. If the above is the correct view of the record, the argument in relation to EXHIBIT D, next hereinafter made, is irrelevant and is only made by us *de bene esse.*

III.

Ascertainment of net earnings under the Thurman Act. What expenditures actually and necessarily made in operating the road and keeping it in repair may be deducted from gross earnings in order to determine the net earnings of the Union Division of claimants' road.

The earnings and expenses of the Union Division, from July 1, 1878 (date when Thurman Act took effect), to December 31, 1882 (the period covered by the suit), is set forth in Finding No. XIV. (Record, pp. 19–22).

The items of those expenditures disputed by the Government are those set forth in Exhibit D (Record, pp. 12–17).

It is not disputed that the expenditures were made, and were necessary to be made, but it is urged that they cannot properly be taken into the account in arriving at the net earnings, twenty-five per cent. of which the company is required, by the Thurman Act, to pay into the sinking fund created by that act.

The following is a classification and condensation of the items in said Exhibit D:

Classification of the Items in Exhibit "D."

Exhibit " D " Condensed.—July 1, 1878, to December 31, 1882—4½ years (the period covered by the suit).

	Amount of Expense.		Annual Average.
Depot buildings in the 4½ years.	$56,982 53		$12,662 78
		25 p. c.—	3,165 69

	Amount of Expense.		Annual Average.
Waterworks	127,988 25		28,441 83
		25 p. c.—	7,110 45
Real estate, land and right of way	53,861 22		11,969 16
		25 p. c.—	2,992 54
Hotels, eating houses and tenements	19,071 83		4,238 18
		25 p. c.—	1,059 54
Engine houses	19,444 59		4,321 02
		25 p. c.—	1,080 25
Machine shops, car shops, rolling mills,* &c	495,229 10		110,050 91
		25 p. c.—	27,512 73
Tools and machinery	155,763 15		34,614 04
		25 p. c.—	8,653 51
Ice houses	8,499 69		1,888 82
		25 p. c.—	472 21
Coal sheds and coal shutes	36,707 18		8,157 15
		25 p. c.—	2,039 28
Coal track, Carbon	18,817 34		4,181 64
		25 p. c.—	1,045 41
Stock yards, Omaha	7,150 00		1,588 89
		25 p. c.—	397 22
Charcoal house, Omaha	346 02		76 90
		25 p. c.—	19 23
Total ("Construction")	$999,860 90		$222,191 32
		25 p. c.—	55,547 83
Car (equipment), including postal cars	$1,241,015 98		$275,781 33
		25 p. c.—	68,945 33
Locomotive equipnent†	522,793 76		116,176 39
		25 p. c.—	29,044 09
Total (equipment)	$1,763,809 74		$391,957 72
		25 p. c.—	97,989 43
Total, Exhibit "D," (p. 237)	$2,763,670 64		$614,149 04
		25 p. c.—	143,537 26

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* Rolling Mill, Laramie. U. S. R. R. Com'rs Report, 1882, p. 29, he says: "The necessity for building these mills was early appreciated, and its accomplishment is highly creditable and economical to the company."

† The U. S. R. R. Com'r in his report for 1883, p. 22, referring to the year of 1882, says: "Locomotive service has been improved by the addition of 12 powerful consolidation engines, at a cost of $172,273.39, to take the place of 16 locomotives which were considered too light for economical service, and which were sold to the Salt Lake and Western, Utah Central, and Oregon Short-Line Railroads for $186,000."

As showing what the words "depots," "water works," "hotels," "machine shops," &c., as used in the account, Exhibit D, mean, and the circumstances under which the expenditures were made, reference may be made by way of illustration to a finding which was asked by the claimant, as follows:

"That included in said expenditures in said EXHIBIT "D" is an expenditure of $522,793.76 FOR NEW LOCOMOTIVES and $1,241,015.98 FOR NEW CARS, and the purchases of the same were necessary to meet the demands of the public and the Government, and enable the company to do the business of the Government

THE FINDINGS OF FACT by the Court of Claims, on this subject, are as follows (Record, p. 22):

XV.

"In the expenses mentioned in the next preceding finding (XIV) are included all the items set out in Exhibit D hereto annexed.

"The Court find that all said items were in good faith actually paid out of the earnings of the road, were not charged to construction or building the road nor to capital, and they were necessary expenses for operating the road and keeping the same in repair, and in a proper condition for the transaction of the current business of the road in a profitable and economical

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and the public; and including the said purchases, its equipment of engines and cars was less than, and not in excess of, what was necessary for the proper transaction of the business of the company. From 1877 to 1882 the tonnage of the road increased 100 per cent., while its equipment was increased only 60 per cent.

Record, pp. 163, 170, 286, 153.

Some of the said engines and cars were purchased to supply the place of others that were no longer suitable for the business of the company, and some for the purpose of adding to its equipment.

Record, p. 169.

THE MAIL CARS mentioned in said Exhibit D were acquired upon the request of the Post Office Department, and were fitted up and exclusively used for the postal service of the Government (p. 155).

THE LANDS mentioned in said Exhibit D were purchased for extension of yards and tracks to reach stock yards, lumber yards, stone yards and warehouses (p. 283); what are called ICE-HOUSES were built as a matter of economy and necessity to store ice in to supply trains, it having been found that the company could in this way supply their trains with ice very much cheaper than it could purchase ice for from private parties (p. 284).

THE COAL MINE TRACK AT CARBON was built as a matter of economy and necessity to supply the company with coal for steam purposes, its old mine in that vicinity having been worked out (p. 284).

THE COAL SHEDS were necessary to be built to store coal and protect it from the weather, and the COAL-CHUTES are a labor-saving and economical device whereby the company saves nearly 20 cents a ton on every ton it puts into the tender of an engine over the old method (pp. 285, 184).

THE WATER WORKS at Council Bluffs, Omaha, and other places mentioned in said Exhibit D, were put in to supply the locomotives, machine shops and water-tanks with water, and those at Council Bluffs were speedily needed for protection or the company's terminal buildings and property from fire, there being no public waterworks at that place. They were all necessary for these purposes, and were more economical than to get a supply of water by transporting it in trains or in any other manner. The water works consisted of wells, pumps, tanks and pipes, and were necessary for the economical and proper operation of the road (pp. 285, 333, 153, 188, 189).

The cattle traffic has greatly increased on the claimant's road, and to accommodate it it was necessary to build the STOCK YARDS and to acquire the REFRIGERATOR CARS mentioned in Exhibit D (p. 334).

RAWLINS is at the end of a freight division of the road where the motive power requires much care, attention and repairs (p. 188), and the ROUND-HOUSE manner, although increasing the real value of the company's property to that extent.

"The words 'operating expenses' have no technical sense accepted by railroad men.

"From 1869 the directors of the Union Pacific Company have made annual printed reports to the stockholders, which were furnished to the Government directors, to any one who applied, and were open to inspection to the general public. They were the only official publications that the company made. In these reports the statement of 'operating expenses' was invariably kept separate from expenditures for new construction and new equipment. The following extracts from the report of 1879 show the method in which the company, from 1869 to 1882, indirectly have treated the matter in their reports :

AND WATER WORKS, mentioned in Exhibit D, at that place were necessary for the economical and proper operation of the road.

What are called in Exhibit D HOTELS at Council Bluffs and other places are eating establishments for the accommodation of passengers (p. 188, Q. 74 and Ans.), and what are called TENEMENT HOUSES are for the use of employees in the yard and those engaged in the handling of freight and the care thereof (pp. 188, 200).

Council Bluffs is the terminus of claimant's 1,035 miles of railroad. At the transfer station at that place five or six roads connect with the Union Pacific road, and such station is a mile and a half from the cities of Council Bluffs and Omaha, and without such EATING ACCOMMODATIONS passengers would be put to very great inconvenience, discomfort and delay (pp. 197, 198).

GRAND ISLAND is 153 miles from Omaha, and North Platte is 293 miles from Omaha, and both places are ends of divisions, and MACHINE SHOPS were located there in addition to those at Omaha because it was found in the practical operation of the road necessary and economical to have such shops so located that the disabled motive power and rolling stock would have to be transported the least possible distance for repairs; and the shops at those places and other places on the road, mentioned in said Exhibit D, were established to do the work more economically than it could be done at Omaha, at which place the facilities, by reason of the growth of business, were not sufficient, and these shops and their tools, machinery and equipment, mentioned in said Exhibit D, were not in excess of, but less than, the needs of the business of the road to keep the rolling stock in repair. The principal work done at these shops is the repair of rolling stock; at the shops in Omaha and Grand Island some new rolling stock is made, when the hands would otherwise be idle, but the other shops are used exclusively for repairs of rolling stock, and all of the same, with the tools and machinery, were necessary to the proper operation of the road, including those at Cheyenne, Laramie, Rawlins, Evanston and other places.
Record, pp. 156, 157, 159, 202, 286.

THE RAIL MILL AT LARAMIE is used to cut off the ends of rails that are bruised and battered, where the balance of the rail is good, so that they can be again put down in the track, and thus save the necessity of re-rolling, and the expenditure therefor was necessary and proper for the operation of the road (pp. 188, 189).

The following witnesses, not connected with the claimant company, on being shown the said Exhibit "D," testified that the items therein charged were expenditures properly appertaining to operating a railroad and keeping the same in a state of repair, and properly chargeable against earnings and income, and if paid out of the same the amount should not be added or charged to capital, viz.: Mr Hinckley, President Philadelphia, Wilmington and Baltimore Railroad Company; Mr. Mellen, General Superintendent Boston and Lowell Railroad; Mr. Blanchard, Vice-President New York, Lake Erie and Western Railroad; Mr. Fleetwood, auditor New York, New Haven and Hartford Railroad Company, and other witnesses, and the weight of testimony was to this effect."

"'The earnings and expenses for the year 1879 are as follows:

Gross earnings, including Omaha bridge	$13,201,077 66
Deduct operating expenses (including taxes)	5,475,503 44
Surplus earnings	7,725,574 22

"'The operating expenses were 41.48 per cent. of the gross earnings.'

"'The earnings and expenses for the years 1878 and 1879, including Omaha bridge, compare as follows:

	1878.	1879.
Gross earnings	$13,121,272 58	$13,201,077 66
Operating expenses	5,376,586 19	5,475,503 44
Surplus earnings	$7,744,686 39	$7,725,574 22
Percentage of expenses: Earnings	40 98	41 48

"'For a more detailed statement of the operating expenses, and a comparison thereof with the year 1878, attention is called to the table hereto appended.' 'The construction expenditures of 1879 were as follows:'

"The follows a table identical with that of Exhibit D for that year. There is also found in said report a detailed statement of operating expenses for 1878–1879, the total of which is $5,475,503.44 as aforesaid.

"Exhibit D has been taken from the books of the company, where it is kept separately, the separation and division by the company being accepted by the defendants for the purposes of this case, the items being the expenditures shown by the books of the company for 'new constructions' and 'new equipment.' Those items have been reported by the company as 'surplus earnings,' and as so far increasing the value of its property.

"The increase of business which demanded these expenditures resulted from the demands of the public, mostly by reason of the construction of feeders by the company tributary to the main line, which opened a wider extent of country, and not from any special demands of the Government."

[All that part of this finding after and including the sentence, "The words 'operating expenses' have no "technical sense," &c., were found at the instance of the Government.]

The ultimate facts found in the first two sentences of this finding, and which bring the expenditures in EXHIBIT D within the precise language of the Thurman Act (Sec. 1), really leave no question of law arising upon this finding; and the company ought, perhaps, to submit the matter to the Court without any further observation than that the facts so found conclude discussion.

Language of Thurman Act, Section 1.	*Language of the Finding of Facts*
"The net earnings shall be ascertained by deducting from gross earnings the necessary expenses actually paid within the year in operating the road and keeping the same in a state of repair," &c.	"The Court finds that all of said items [in Exhibit D] were in good faith actually paid out of the earnings of the road, were not charged to contruction or building the road nor to capital, and they were necessary expenses for operating the road and keeping the same in repair, and in a proper condition for the transaction of the current business of the road in a profitable and economical manner, although increasing the real value of the company's property to that extent."

THE OPINION of the Court of Claims on the legal effect of the finding of fact No. XV., *supra*, is as follows (Record, p. 36 *et seq.*):

"In addition to the controversy as to compensation to be allowed for carrying the mails, which is settled by the findings of facts, a question of law is involved as to whether or not certain items of expenditure, partly in the nature of permanent improvements (set out in Exhibit D), shall be deducted from the gross earnings in determining the net earnings under the language of the Thurman Act.

"In the case of the *Union Pacific Railroad Company vs. United States* (99 U. S. R., 402), above cited, the Supreme Court decided that under the Act of 1862, in determining the net earnings there was to be deducted from the gross earnings expenditures which the company had actually paid out of its earnings for the following objects:

"1. Station buildings; 2. Shops and fixtures; 3. Equipment; 4. Government Commissioners; 5. Fencing; 6. Snow sheds and fences; 7. Express outfit; 8. Engineering; 9. Bridging; 10. Car shops and sheds; 11. Roadway and track; 12. Hotels; 13. Tenements; 14. Coal sheds; 15. Omaha depot buildings; 16. Omaha general offices; 17. Real estate; 18. Laramie rolling mill; 19. Water-works.

"Between July 1, 1878, and December 31, 1882, the company paid out of its earnings the sum of $2,763,670.64 for equipment and improvements of one or another description specified in those nineteen items, as shown by Exhibit D, and it claims a legal right, in ascertaining its net earnings during that period, to deduct that amount from its gross earnings during the same period.

"If the Act of May 7, 1878 (20 Stat. L., 56, Ch. 96), commonly called the "Thurman Act," had not been passed, the Supreme Court's decision would be conclusive in favor of the company's claim to that deduction; but it is contended for the Government that a different rule is prescribed by that act. Whether this is so or not is the question we are required to decide.

"Section 1 of the Thurman Act reads as follows:

> That the net earnings mentioned in said act of eighteen hundred and sixty-two, of said railroad companies respectively, shall be ascertained by deducting from the gross amount of their earnings respectively the necessary expenses actually paid within the year in operating the same and keeping the same in a state of repair, and also the sum paid by them respectively within the year in discharge of interest on their first mortgage bonds, whose lien has priority over the lien of the United States, and excluding from consideration all sums owing or paid by said companies respectively for in-

terest upon any other portion of their indebtedness; and the foregoing provision shall be deemed and taken as an amendment of said act of eighteen hundred and sixty-four, as well as of said act of eighteen hundred and sixty-two. This section shall take effect on the 30th day of June next, and be applicable to all computations of net earnings thereafter; but it shall not affect any right of the United States, or of either of said railroad companies existing prior thereto.

"The question growing out of this provision is mainly connected with the use of the word 'necessary' along with the words 'expenses actually paid * * * in operating' the road. The company claims that the expenses embraced in the aforesaid sum of $2,763,670.64 were necessary within the meaning of the statute; the Government contends that they were not.

"Were the word 'necessary' omitted, it could not, we think, be justly questioned that the ruling of the Supreme Court would directly apply to and fully sustain the company's position. Does the insertion of that word change the aspect of the case in this regard? In answering this question we must, of course, endeavor to get at the meaning of the word in that connection."

[The learned Judge here refers to *McCulloch vs. Maryland* (4 Wheaton, 316), and to *The Legal Tender Cases* (110 U. S., 421–440), as defining and illustrating the meaning of the word "necessary," and then continues:

"In the light of these expressions, we feel justified in considering the word 'necessary,' in the Thurman Act, untrammeled by any rigorous obligation to impose on it a severely restrictive sense.

"The Union Pacific Railroad, in the words of the Supreme Court, 'was a national work, originating in national necessities, and requiring national assistance. * * * Although this road was a military necessity, there were other reasons active at the time in producing an opinion for its completion besides the protection of an exposed frontier. There was a vast unpeopled territory lying between the Missouri and Sacramento rivers, which was practically worthless without the facilities afforded by a railroad for the transportation of persons and property. With its construction the agricultural and mineral resources of this territory could be developed, settlements made where settlements were possible, and thereby the wealth and power of the United States largely increased; and there was also the pressing want, in time of peace even, of an improved and cheaper method for the transportation of the mails and of supplies for the army and the Indians. It was in the presence of these facts that Congress undertook to deal with the subject of this railroad' (*United States vs. Union Pacific R. R. Co.*, 91 U. S., 72).

"We cannot lose sight of these views in the consideration of the present controversy without doing probable injustice to both the Legislature and the company. We cannot regard this subject in a cramped or jealous spirit, nor, on the other hand, can we treat it in a spirit of inconsiderate liberality. Our inquiry is, what may the intention of Congress be fairly considered to have been in the use of the words 'necessary expenses in * * * operating' the road?

"The answer to this involves, also, the meaning to be ascribed to the word 'operating.'

"In its restricted sense, it might be confined to the mere running of trains over the road, and the ordinary incidents thereof; but we do not feel bound so to limit it. We think it was intended by the Legislature to be understood in its larger and more comprehensive sense of fully performing the greater work which the road was intended to do, in promoting the reclaiming, peopling and developing of 'a vast unpeopled territory * * * which was practically worthless without the acilities afforded by a railroad for the transportation of persons and property.'

"However viewed, it was quite certain, in the light of all experience, that there would be a growth in the business of this road. It was not supposable that its traffic would remain stationary for any length of time. As settlements were made along the line, its business would increase; in what ratio time alone could determine. Is it reasonable to suppose that this was not foreseen by Congress? And if foreseen, is it fair to assume that that body intended to enact provisions which would obstruct the efforts of the company to meet the increase? We think not. On the contrary, we are led to the opposite conclusion. It seems to us clear that when, in the Thurman Act, that body used the terms 'necessary expenses * * * of operating' the road, it referred to the expenses of operating it, in all respects, *pari passu* with all the fair and legitimate demands of the business coming to it; and that the word 'necessary' was not meant in its most stringent and restrictive import, but in the sense of limiting the company to such expenses as were *bona fide* conducive or adapted to that end, and to exclude those which were not. And this leads us to the ultimate conclusion, that those words in the Thurman Act do not in reality make a rule different from that indicated by the Supreme Court in 99 U. S., 402. The outlays which were there approved included all kinds of expenditures which the company now claims a right to deduct from its gross earnings in the process of ascertaining the amount of its net earnings. Hence, in our opinion, the company is just as much entitled to deduct them now as it would be if that act had not been passed.

"Therefore, our judgment is, that the company is entitled, in ascertaining the net earnings between July 1, 1878, and December 31, 1882, to deduct from the gross earnings of that period the sum of $2,763,670.64 on account of the items set out in Exhibit D, and actually paid by it out of earnings for equipment and improvements, and in the computation of the net earnings the Court has included all those items in necessary expenses of operating and keeping the road in repair."

THE MATTER SEEMS PLAIN ENOUGH on the foregoing discussion of it by the Court, but as this subject, if it is before the Court, is important to the company, it is perhaps, required of its counsel to suggest any further considerations that occur to them in support of the conclusion and judgment of the Court below.

1. The expenditures in Exhibit D are not *extraordinary* expenses, or in excess of *actual needs* of the com-

pany and the requirements of the charter and the public (see Finding XV.).

Charter object—a road at all times in "repair and use," § 6, Act of 1862.

Forfeited if "out of repair or unfit for use," § 17.

"In working order," &c., § 18.

2. They were made in *good faith* and to secure the more economical operation of the road, and to enable the company to do its traffic (see Finding XV., *supra*).

They were made with the approval of the Government Directors and United States Commissioner of Railroads.

> Government Directors, Sec. 13, Act 1864.
> Government Directors' Report, 1879, pp. 4, 5, 6.
> U. S. R. R. Commissioner's Report, 1881, pp. 8, 9, 10.
> *Ib.*, 1882, pp. 14, 33; *Ib.*, 1883, pp. 22, 23.

3. All of the items in Exhibit "D" were actually paid out of earnings and income and never made subject of *stock or bond dividend, or in any manner capitalized* (see Finding XV., *supra*).

Judicial definition of net earnings, 99 U. S., 402 (U. P. Case); Ib., 455 (K. P. Case).

The decision in the Net Earnings Cases (99 U. S., 402, 455) covers and embraces items of all the kinds for which the company now claims to be allowed, unless the rule herein established has been legislatively changed by the THURMAN ACT (Sec. 1).

A careful examination of the Net Earnings Cases, *supra*, will show that every question now here sought to be reopened and relitigated was there decided.

The Court of Claims, on the hearing of the Net Earnings Cases, *supra*, rejected all expenditures for "new station buildings," "hotels at stations for feeding passengers," "new engines and cars," "The Laramie Rolling Mill," "water tanks," &c.

This was done by that Court on the two distinct grounds:

1. They were "not expenses of *operating the road* and line to earn the gross receipts."

2. It did not appear "that the construction fund," to wit, the lands, had been exhausted (Court of Claims Rep., p.).

Both grounds were overruled by the Supreme Court.

> "They ['net earnings'] have nothing to do with the income or profits of the company as a holder of public lands." (Per Mr. Justice BRADLEY.)

Expenses incurred *after* the completion of the road, "in the subsequent *enlargement and improvement* thereof, if *actually paid out of earnings and not carried to capital account, or made the subject of a stock and bond dividend*," may be deducted from gross earnings, in order to ascertain net earnings.

> "The true interest of the Government is the same as the stockholders, and will be subserved by encouraging a liberal application of the earnings to the *improvement* of the works." (Per BRADLEY, J., in Net Earnings Cases.)

The exact point decided by the Supreme Court in the Net Earnings Cases, *supra*, is, that where the company, after the completion of its road, "enlarges and improves the same so as to accommodate the gradual increase of traffic, the public accommodation, and secure the general permanency and completion of its works," *i. e.*, all such items as contained in Exhibit D, "such expenditures, if actually paid out of earnings, and not capitalized, *i. e.*, made the subject of a stock or bond dividend, may properly be charged against earnings" as an operating expense, and not to capital account as a construction expense.

THURMAN ACT.

The present case presents nothing new. There is no *language in the Thurman Act which changes* the question in respect to necessary expenditures for cars, station buildings and other like improvements, as it existed when the net earnings decision was made.

This we now proceed to show :

These "Net Earnings Cases" were before the Court of Claims when the Thurman Act was passed, and the conflicting claims of the Government and the companies in this respect, as well as others, were well known to Congress.

Section 1 of the Thurman Act of May 7th, 1878, enacts :

> "That the net earnings mentioned in the said Act of July 1st, 1862, of said railroad companies respectively (viz., the Union Pacific and Central Pacific *and no others*), shall be ascertained by deducting from the gross amount of their earnings, respectively, the necessary expenses actually paid within the year in operating the same and keeping the same in a state of repair, and also the sum paid by them respectively within the year in discharge of interest on their first mortgage bonds, whose lien has priority over the lien of the United States, and excluding from consideration all sums owing or paid by said companies respectively for interest upon any other portion of their indebtedness."

1. This act *in pari materia* with the Acts of 1862, 1864 and March 3, 1873, referred to, *infra*.

2. "Necessary expenses actually paid within the year in operating the same and keeping the same in a state of repair."

How *operating* the same? Answer as required by its charter: Act 1862, section 6, "repair and use;" Act 1862, section 17, "repair and use;" Act 1862, section 18, "at all times in working order;" "and keeping the same in a state of repair," that is, "fit for use at all times."

Thurman Act Should not be Stretched.

We shall not in this place characterize the Thurman Act. It certainly ought not to *be stretched* by construction. The original contract, as modified by the Act of 1864, was express, viz.:

1. The Government has a "lien on the whole line of railroad, *rolling stock*, fixtures and property" (Section 5).

2. It had a right to apply on the debt *one-half* of the Government earnings, and it agreed to pay the other half *in cash to the companies*. (United States vs. Union Pacific Railroad Co., 91 U. S., 72—1875; see Opinion of Mr. Justice Davis, *Ib.*, p. 90.)

3. To apply to the same debt five per cent. of the net earnings of the companies.

Now, the Thurman Act lays its hands on the half compensation, which the Government agreed in 1864 to pay to the companies in cash, as part of the 25 per cent. of net earnings, and puts it into the sinking fund which is established; so that every dollar these companies now earn for Government service, and the balance constituting 25 per cent. of net earnings, is impounded by the Government and folded up in a napkin idle and unprofitable.

See Railroad Commissioner's Reports for 1885, p. 8, where he says, speaking of the Sinking Fund under the Thurman Act: "*This amount of more than twenty millions is lying idle.*"

OPERATION OF THE ACT.

How purblind the wisest!

Mr. Senator THURMAN said sinking fund would give companies 6 per cent.

See his speech of March 12th, 1878, in Congressional Debates, cited *infra*.

The Act is a confessed failure, and confessedly works an injustice to the company.

Railroad Commissioner's Report 1883, p. 12.

The company has now a large sum in the sinking fund which cannot be invested without loss.

To Nov. 1, 1884:

Amount paid for premiums on Government bonds	$172,990 43
Total amount interest received	178,759 71
At 4 per cent. would have realized us	444,354 90

which is a dead loss.

Under the Thurman Act since 1878, after we are allowed "Exhibit D," we will have paid in an amount equal to the annual interest outlay of the United States since that time.

SURROUNDING CIRCUMSTANCES WHEN THE THURMAN ACT WAS PASSED.

Funded debt:

Thurman's Report, p. 2.....$78,733,712

The Government Directors, prior to the Thurman Act (or, indeed, since), never complained of the claim of the company to deduct "new equipment," &c., but only its claim to deduct *interest* on other than the first mortgage. The company's claim in 1878 in respect of *new equipment*, &c., was no mischief; the claim was, and still is, comparatively small and necessary to operation of the road.

The interest claim of the company as to the inferior debt and other debts was the material and serious matter.

The company's contention in the Net Earnings Case was, that as the Government had not only authorized the first mortgage debt, but had authorized or recognized the other debts of the company (sinking-fund mortgage, Omaha bridge bonds, &c.), that *the interest on all this indebtedness,* "being interest paid on money borrowed to carry on the operations which have resulted in the gross income, are proper deductions to be made to arrive at net earnings or income." (Mr. SIDNEY BARLETT's Argument for the Company, p. 5.)

Government Directors' Report 1876, pp. 16, 17.

Government Directors' Report 1877, pp. 16, 17.

Senator Thurman's report, accompanying the Thurman Act, included the so-called "construction expenses" as "operating expenses."

Mr. Thurman's Report, p. 3.

For year 1875, total expenses, $5,373,655.87; which included $585,025.87, "new construction."

See Government Directors' Report 1875, p. 7, for the items of this $585,025.87.

That Mr. Senator Thurman understood in his report that "operating expenses" included "new equipment," &c., is *demonstrated* by his exposition on page 5 of his report of the effect of his proposed act.

Thurman's Report, p. 5.

THREE CONSIDERATIONS plainly show that Congress did not by the Thurman Act intend to disallow deductions from gross earnings for the cost of necessary improvements *bona fide* made, and of necessary equipment purchased and paid for out of earning, in ascertaining the net earnings, 25 per cent. whereof the act proceeds to appropriate for the indemnification of the Government.

1ST. IT WAS SO STATED BY ITS AUTHOR AND EXPOUNDER IN THE CAREFULLY PREPARED SPEECH IN WHICH ITS OBJECTS WERE UNFOLDED AND EXPLAINED.

See speech of Mr. Senator Thurman in the Senate, March 12th, 1878, Congressional Record, 45th Congress, 2d session, Vol. 7, part 2, p. 1691.

The bill attracted universal attention, in Congress and out of it. *It does not belong to the numerous class of bills that "travels in the caravan of legislation, unheeded and unnoticed."* It was carefully framed upon a full knowledge of the very questions now arising. Mr. Thurman had written the report which accompanied the bill, and, as the author of the bill, he introduced it to the Senate, with a commentary upon and exposition of every section. Under such circumstances, what he says as to the purpose and object of the bill has almost the force of judicial interpretation.

2. THE REASONS WHICH CONTROLLED THE COURT IN THE NET EARNINGS DECISION EQUALLY APPLY UNDER THE THURMAN ACT.

The Government counsel are insisting upon a view which is as injurious to the best interests of the Government as to those of the company.

The reasons given by Mr. Justice BRADLEY show a thoroughly study and familiarity with the whole subject, and are still applicable in all their force.

See, particularly, p. 420 *et seq.* of 99 U. S.

To capitalize all improvements and new equipment will in the end bankrupt any company that does it. To pay for them out of earnings is the only safe and true course. It is the wise policy of "*Pay as you go.*" *

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* We subjoin the following extracts from the testimony, not as part of the record, but simply to illustrate a general question relating to railway management:

EXTRACTS FROM TESTIMONY.

"Additional rolling stock is an operating expense, since we are compelled to provide these additional facilities for the operation of our road." (FLEETWOOD, Auditor N. Y., N. H. and Hartford R. R. Co., p. 361, ans. 27.)

"New locomotives and new cars to add to the original plant, and in addition to those purchased to make good depreciation, and purchased to enable the company to conduct its increasing business or to reduce expenses, should be charged to *repairs* of locomotives or *repairs* of cars." (FLEETWOOD, p. 379.)

"The growth of the traffic of the company must be met by adequate and parallel growth in the means of operation and use. There cannot be any operation and use, within the worthy sense of these words, unless there is an adequate and parallel increase of facilities for moving and handling the traffic of the road." (BLANCHARD, Vice-President of Erie Ry. Co., p. 334.)

"Any expense incurred for the operating of the road, facilities for doing business, should properly be charged to expense account,"

3. THE WORDS OF SECTION 1 OF THE THURMAN ACT DO NOT REQUIRE THE COURT TO PUT THE CONSTRUCTION UPON THEM FOR WHICH THE GOVERNMENT CONTENDS. A CONSTRUCTION WHICH IS SEVERE AND HARSH UPON THE COMPANY, AND AT THE SAME TIME INJURIOUS TO THE GOVERNMENT, HAS NOTHING TO RECOMMEND IT.

The Thurman Act relieved the company of none of its charter obligations to keep its road at all times "in working order," "in repair," and "fit for use," and "to *use* and operate the same." The construction account of the road had been closed years before. This Court decided that the road was completed November 6th, 1869, and the Supreme Court in the Net Earnings Case affirmed its judgment on this point.

In 1873 (March 3d, 17 Stats., 508) Congress had enacted :

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i. e., paid for out of earnings. (Kendrick, General Manager of Old Colony R. R., p. 394, Q. 89 and answer.)

"It is just to charge to the operating expenses of the road such a proportion of the new equipment as would keep the equipment of the road equal in value to what it was in value the previous year, and *to accommodate such additional business, and do* it efficiently, as would be offered in excess of the previous years." (Mellen, General Superintendent of Boston and Lowell, p. 419, Q. 17 and answer.)

"Taking the Union Pacific as a whole, I should generally class the whole list covered by 'Exhibit D' as in the nature of *repairs and maintenance*. Keeping the road and property in repair implies that we not only keep the road up to the condition of efficiency we found it at the beginning of the six months, but so repaired that we might be able to do all the business that might come upon the road at the end of the six months." (Kimball, Traffic Manager of Union Pacific, p. 293.)

"My view is that keeping the Union Pacific in *repair* is keeping it ready to transact business." (Kimball, p. 30.)

"A Construction Expenditure, as railway officers understand it generally, is an amount that may be capitalized. When I speak of construction expenditures as being separate from operating expenditures, that is what I mean." (Kirkman, Government's witness, Comptroller of Chicago and N. W. Ry. Co., p. 612.)

"THE BANKRUPT ACT SHALL NOT APPLY TO THE UNION PACIFIC."

ACT 1873: "No dividend shall hereafter be made by said company but from net earnings thereof; no new stock shall be issued, or mortgages or pledges made on the property or future earnings of the company without leave of Congress, except funding and securing debt now existing, or the renewals thereof."

ACT 1864, SEC. 2: "The capital stock of the company shall not be increased beyond the actual cost of the road."

Under this legislation the company cannot capitalize the expenditures in question.

NOTICE THE LANGUAGE OF SECTION 1 OF THE THURMAN ACT.

1. "*Necessary expenses*" "*and repairs*"—not "operating expenses," or "*ordinary* operating expenses," or "*ordinary* repairs." If the expenses are *necessary*, the Government and the company have a common interest in having them made; and it is found as a fact that the expenses in Exhibit D were necessarily and properly made.

2. "*Actually paid*," *i. e.*, out of earnings.

3. "In operating the road and keeping it in a state of repair."

4. The Thurman Act is specific as to interest--silent as to "new equipment," etc.

5. Stockholders can get no dividends until expenses such as those in Exhibit D are paid. Thurman Act did not intend to prohibit charges to earnings for new equipment, &c.

6. The items in Exhibit D are embraced in Government's lien, and Government gets 25 per cent. of the

increased earnings, which the company is thereby enabled to make.

It is not a question, as this Court pointed out in the Net Earnings Cases, whether the Government shall get something now or never, but only whether it gets about $150,000 per year a little sooner, at the expense of the efficient and economical management of the company.

It is, therefore, clear, we submit, that the *object* of Section 1 of the Thurman Act, in *defining net earnings*, was not to prevent or discourage the company from applying its earnings to the making of needful improvements and the purchase of needful equipment, or other expenses intended to secure a better and more economical service, and, consequently, larger earnings. This was no evil that needed legislative correction. But the object of Section 1 was chiefly to determine what other expenses, and particularly what *interest* paid by the company might be deducted from gross earnings ; and this point it specifically settled against the company's contention in the Net Earnings Suit.

Neither the Thurman Act nor any other act of Congress provides for or contemplates any such thing as a continuing (*a*) "*construction account*" and (*b*) "*an operating account*," and to keep the same separate. And the Thurman Act does not use the words "*operating expenses*" and "*construction expenses*."

It is impossible to conceive that Congress would have enacted into a law this distinction (so uncertain, so undefined and undefinable, and sure to breed dispute) without any definition of what they meant by an "operating expense" and what by a "construction expense." This is a troublesome refinement which the counsel for the Government are seeking to inject into the act.

The unreasonableness of supposing that Congress meant deliberately to *create or recognize* the undefinable distinction between "*operating*" and "*construction*" expenses, *without supplying a legislative definition or line of demarkation*, ought of itself to end the controversy on this point. The language of the act is clear; it says: You may "deduct the necessary expenses [that they were necessary is not disputed] actually paid within the year [that is not disputed] in operating the road and keeping the same in a state of repair;" that is, "not operating expenses" in distinction to "construction expenses," but any "necessary expenses actually paid" in conducting the business and operations of the road as required by its charter.

Did Congress, in the Thurman Act, mean to say, "*Your road is completed;* the country has attained its growth; no *new towns* will spring up on your line; *you have equipment enough;* you may maintain the existing engines and cars, supply them with wheels this year and something else next, and thus give them a sort of immortality; but no matter how far behind the times they become, you can't buy new."

Observe the broad language: Any "*necessary expense* actually paid *in operating the road* and keeping it in a *state of repair*," that is, any expense in the conduct of the business and operation of the road necessary to discharge the company's duty to the public and to the Government under its charter, if *actually paid* out of earnings (these are the effectual and only needful limitations), may be deducted.

We maintain that there is a broad *distinction between* *the operating expenses of a road* in the ordinary acceptation of that term, to wit, such expenses as relate to the movement of trains and *the operating a road.* A railroad, in the language of Mr. Justice BRADLEY, is, in a sense, never completed. *It must, of necessity,* as the Court of Claims forcibly points out, *keep pace with the progress of the country.* Unless it does this its rivals will take the business, and it will become unprofitable. We insist, as this word "operating" is used in this statute, it means that the company shall keep its road in a condition as to tracks, stations, sidings, station-houses, equipment, &c., such as will accommodate from time to time the business of the public and Government in accordance with its growth. This subject was fully presented in the testimony of the witnesses who have testified in relation thereto, and we can only regret that their testimony is not before this Court.

Every item in "EXHIBIT D" (*a*) *improves the value of the property,* (*b*) *increases the net earnings of the road,* and thus benefits the Government, which gets 25 per cent. thereof, as well as the company, and (*c*) is *embraced in the lien of the Government, and thus increases its security.*

AN ARGUMENT was made by the counsel for the Government in the Court below in favor of a more limited view of "operating expenses," based upon the ANNUAL REPORTS of the company, which, in making a statement of earnings and expenditures to the stockholders, separated "operating expenses" from "construction expenditures." At the end of six months, after the Thurman Act went into effect, the present dispute arose, after which the items in dispute in "Exhibit D" were kept by the company in two special accounts, called "new construction," "new equipment," and remain there in this shape to this day.

Mink, p. 461.

There has been "no account since 1878 on the company's book, entitled 'operating account,' or 'construction account,' but only one called 'expenses.'"

Mink, pp. 224, 225, Q. 131 and answer, to Q. 146 and answer.
Company's Report, 1882 (as example), pp. 4, 14, 16, 2.

Kirkman (Government witness) explains the reasons for this method of keeping accounts (Record, pp. 608, 609).

It was very proper for the company in its annual statement to its stockholders to show to them what had been expended for ordinary operating expenses, and what for new equipment and additions to the property, such as are embraced in Exhibit D. As these expenditures were never capitalized in any form, the statements in this respect in the annual reports of the company were properly treated by the Court of Claims as immaterial. Precisely the same kind of statements had been made by the company in the Net Earnings Cases as the records will show, and such statements were regarded by this Court as immaterial.

IV.

Under the Thurman Act the Government is not entitled to 25 per cent. on its earn-

ings during the year for Government service.

The Court below in the present case held that under the Thurman Act the earnings of the company for services for the United States, all of which under the act is retained by the Government, should be included in the amount on which the 25 per cent. is to be calculated.

The company in the Net Earnings Cases (99 U. S., p. 419) made the point that this could not be done under the Acts of 1862 and 1864, and this Court with evident reluctance and doubt ruled it against the company.

We renew the objection that under the Thurman Act 25 per cent. of net earnings cannot be estimated on the amount of Government transportation for the year. As under that Act (section 2) none of these earnings come, or *can come*, into the possession of the company, the whole being retained by the United States, it is submitted that it is not a fair construction of the Act to make the company pay in cash one-quarter of all Government earnings into the sinking fund created thereby, in addition to the whole of such earnings.

V.

Cash Requirements of the Thurman Act, Section 4.

The Government's claim in this respect is stated by the Court of Claims in the record (p. 36), in the last paragraph preceding side paging 40.

In its opinion on this subject that Court says (Record, p. 40):

"Another question of law is raised on the construction of that part of the Thurman Act which requires the company to pay certain money into the Treasury of the United States.

"Section 2 requires one-half of the whole amount of compensation which may, from time to time, be due to the Union Pacific Railroad Company, for services rendered to the Government, returned by the defendants, to be turned into the sinking fund thereinafter provided, for the uses therein mentioned; and section 3 of the act establishes and regulates that fund.

"Section 4 provides as follows:

> "'That there shall be carried to the credit of the said fund, on the first day of February in each year, the one half of the compensation for services hereinbefore named, rendered for the Government by said Union Pacific Railroad Company, not applied in liquidation of interest; and, in addition thereto, the said company shall, on said day in each year, pay into the Treasury, to the credit of said sinking fund, the sum of *eight hundred and fifty thousand dollars, or so much thereof* as shall be necessary to make the five per centum of the net earnings of its said road payable to the United States under said act of eighteen hundred and sixty-two, and the whole sum earned by it as compensation for services rendered for the United States, together with the sum by this section required to be paid, amount in the aggregate to twenty-five per centum of the whole net earnings of said railroad company, ascertained and defined as hereinbefore provided for the year ending on the thirty-first day of December next preceding.'

"We do not feel called to enter on an extended discussion of the section, but will state in brief terms our view of it.

"It seems quite clear to us that the purpose of that act was not to alter the provision of the Act of 1862 requiring 5 per cent. of the net earnings to be paid into the Treasury, but to add thereto *so much of $850,000 each year* as with said 5 per cent., and the whole compensation for services performed for the Government, should equal 25 per cent. of its net earnings, and no more.

"In accordance with these views the defendants are entitled to recover on their counter claim, as set out in Findings XII. and XIII., the sum of, &c."

We maintain that it was the purpose of section 4 of the Thurman Act to make $850,000 the maximum limit of cash requirement in any one year, not $850,000 in addition to the five per cent. requirement of the Act of 1862, but $850,000 including such five per cent. requirement, if the sum of $850,000 shall be needed in addition to the whole earnings for Government service to make 25 per cent. of the whole net earnings of the road for the year. Hence, the language of section 4 of the Thurman Act, "the sum of $850,000, or so much thereof as shall be necessary to make the five per centum of net earnings, &c., amount in the aggregate to 25 per cent. of the whole net earnings, &c."

In the Court's statement of the account it found that there was "payable in cash [by the company] for the year 1882, $1,010,808.94" (Record, p. 22).

The same sum appears in the recapitulation of the amounts due on the counterclaim on page 33 of the record, and enters into the final judgment against the company (Record, pp. 32, 33, 40, 41). As the maximum cash requirement for any one year, it is obvious that the judgment of the Court of Claims against the company is too large by the difference between $850,000 and $1,010,808.94, viz., $160,808.94, and the company asks, in any event, that the judgment of the Court of Claims against it be reduced this amount, viz., $160,808.94.

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